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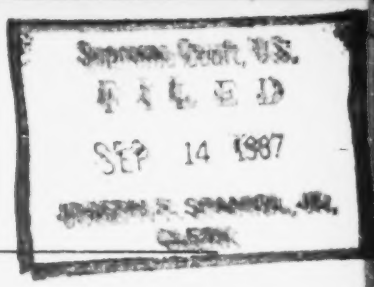


NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GRIFFIN AND BRAND OF MCALLEN, INC., ET. AL.,

PETITIONERS,

v.

MARGARITO REYES, ET. AL.,

RESPONDENTS.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 11, 1987

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the instant case is a proper case for the issuance of a writ of mandamus.

2. Whether Respondents carried the burden of showing that they are entitled to issuance of a writ of mandamus:

   a. Whether Respondents have an alternative adequate remedy available;

   b. Whether Respondents have shown a clear right to the relief sought; and

   c. Whether the District Court had a duty to rule in favor of Respondents.

3. Whether the Court of Appeals based issuance of the writ of mandamus on the erroneous finding that Petitioners' reason for inquiring into Respondents' citizenship or immigration status was to determine Respondents' eligibility for representation by a Legal Services Corporation grantee.

## PARTIES TO THE PROCEEDINGS BELOW

The Respondents before this Court, who were the Plaintiffs in the District Court and the Petitioners for writ of mandamus in the Court of Appeals are the following individuals:

Margarito Reyes
Enrique Alanis
Jesus Alaniz Gonzalez
Rafael Cardenas, Sr.
Rafael Cardenas, Jr.
Santos Carrizales
Bernardo Cervantes
Enrique Diaz
Esteban Hernandez
Juan Hernandez
Juan Jose Nunez
Andres Olivares
Juan Guel Palacios
Abraham Rivera
Jose Solis
Frumencio Torres Trigo
Heberto Valdez
Alfonso Vargas
Pedro Vargas
Abraham Barbosa, Sr.
Cristina Barbosa
Juan Lopez

The Petitioners before this Court, the Defendants before the District Court, and the Respondents to the petition for writ of mandamus in the Court of Appeals are the following farmers and farm labor contractors:

Griffin & Brand of McAllen, Inc.
Daniel Torres
Alfredo Cantu
Benito Bazan
Guadalupe Saldivar

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GRIFFIN AND BRAND OF MCALLEN, INC., ET. AL.,

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MARGARITO REYES, ET. AL.,

RESPONDENTS.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## DECISIONS BELOW

On July 28, 1986, the United States District Court for the Southern District of Texas, Brownsville Division, ordered the Respondents to answer an interrogatory propounded to the Respondents by Petitioners herein which stated:

> "Are you a citizen of the United States? If so, were you born in the United States? If so, please state where you were born and your birth date. If you are a naturalized citizen of the United States, please state where and when you became a citizen of the United States. If you are not a citizen of the United States, please state your immigration status."

Respondents sought a writ of mandamus in the United States Court of Appeals, Fifth Circuit, directing the District Court to withdraw the discovery order of July 28, 1986. On March 30, 1987, the Court of Appeals, with Circuit Judge Edith H. Jones dissenting, granted the writ of mandamus sought by Respondents. That opinion is reported at 814 F.2d at 168 (5th Cir. 1987) and appears at Appendix "A" hereof. Petitioner's petition for rehearing was denied on June 16, 1987 with Judge Jones again dissenting. (Appendix "B")

## JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) and Rule 17 of the

Rules of the Supreme Court of the United States, in that the decision by the United States Court of Appeals for the Fifth Circuit conflicts with the decisions of other federal courts of appeals and this Court on the same matter and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Date of opinion sought to be reviewed: March 30, 1987.

Date of order denying petition for rehearing: June 16, 1987.

## STATUTES INVOLVED

Respondents' cause of action alleges violations of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801 et seq. and the Fair Labor Standards Act 29 U.S.C. § 201 of seq. The Court of Appeals opinion brings into issue the Legal Services Corporation Act, 42 U.S.C. § 2996 et seq. (Appendix "C", "D" and "E")

## STATEMENT OF THE CASE

Background: The individual Respondents, Plaintiffs in the District Court, are farm workers who were employed by Petitioners Benito Bazan, Alfredo Cantu, Guadalupe Saldivar and Daniel Torres, registered Farm Labor Contractors to harvest crops and perform other agricultural labor in the Pecos, Texas area during the fall of 1984. The crops which Respondents harvested were owned by Petitioner Griffin and Brand of McAllen, Inc., a family owned corporation which grows, harvests, processes and sells agricultural commodities.

The complaint: On October 15, 1985, 30 farm workers filed suit against Benito Bazan, Alfredo Cantu, Guadalupe Saldivar, Daniel Torres and Griffin and Brand of McAllen, Inc. alleging that they were migrant farm workers who had been recruited in Hidalgo County, Texas to perform agricultural work in the Pecos, Texas area. Respondents allege

violations of the Agricultural Worker Protection Act 29 U.S.C. § 1801 et seq. (hereinafter "AWPA"), the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (hereinafter "FLSA") and breach of an alleged employment contract. (Appendix "F") Respondents denied all substantive allegations by Petitioners. (Appendix "G")

District Court's Action: Pursuant to ordinary discovery proceedings, Petitioners filed interrogatories, requests for production and scheduled depositions of Respondents. Respondents objected to answering some of the interrogatories, producing some of the documents requested and during depositions, refused to answer questions directed at their citizenship and immigration status.

Petitioners filed a motion to compel answers to the subject interrogatory. (Appendix "H") Following hearing on July 17, 1986, the District Court ordered Respondents

to respond to the interrogatory concerning citizenship and immigration status stating as the reason therefor: "The Court is of the opinion that Defendant is entitled to this information as it may led to relevant evidence." (Appendix "I")

Respondents' motion for reconsideration of the District Court's order was denied by the District Court on October 3, 1986. (Appendix "J")

Court of Appeals' Action: Following entry of the District Court's order of October 3, 1986, Respondents sought issuance of a writ of mandamus from the United States Court of Appeals for the Fifth Circuit, filing their petition on November 4, 1986. Following submission of briefs by Petitioners herein, the Court of Appeals granted the petition for writ of mandamus on March 30, 1987. (Appendix "A") Petitioners timely filed petition for rehearing was denied by

the Court of Appeals on June 18, 1987. (Appendix "B")

In issuing mandamus the Court of Appeals found that the District Court granted discovery on two grounds:

1. "First, a legal services corporation is not entitled to represent undocumented aliens, and..."

2. "second, there is an issue of coverage of undocumented aliens under the Migrant and Seasonal Agricultural Workers Protection Act and the Fair Labor Standards Act."

The Court of Appeals then granted the petition for writ of mandamus stating that the District Court could not inquire into the propriety of representation and that the District Court had ordered discovery as to information which was "completely irrelevent".

The Court of Appeals stated its purpose for issuing the writ of mandamus "to confine

an inferior court to a lawful exercise of its prescribed jurisdiction."

Circuit Judge Edith H. Jones dissented, pointing out in her opinion that the Petitioners herein "never sought to justify their discovery request" on the issue of propriety of representation. Circuit Judge Jones based her dissent on her opinion that the Respondents' permanent place of residence is a material issue in the pending case; and that therefore, the matters sought to be discovered by Petitioners are relevant. Circuit Judge Jones also dissented from the Court of Appeals' denial of Petitioners' petition for rehearing.

## REASONS FOR GRANTING THE WRIT

### I. THIS IS NOT A PROPER CASE FOR THE ISSUANCE OF A WRIT OF MANDAMUS.

As stated many times by this Court, mandamus is an extraordinary remedy which should only be used in extraordinary cases.

Kerr v. U.S. District Court for N. Dist. of Cal., 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed. 2d 305 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953). Historically, mandamus was limited to those cases where a Court either refused to act or acted in excess of its judicial power. More recently, Courts of Appeals have used mandamus as a supervisory mechanism over a District Court that abused its discretion. Mandamus has been used on rare occasions to correct or vacate a discovery order entered by a District Court. However, the burden in such cases is considerable; parties seeking the writ must show that the right to issuance of the writ is clear and indisputable. Will v. United States, supra at 389 U.S. 96.

In the instant case, Respondents did not even attempt to satisfy this burden. Instead of directing their brief to the Court of

Appeals at satisfying the burden of mandamus by focusing on the information sought through the subject interrogatory, Respondents' brief was instead directed at arguing the propriety of the District Court determining whether Texas Rural Legal Aid, Inc. (a Legal Services Corporation grantee) legally represents Respondents, an issue that was not even before the District Court. The District Court was not conducting an inquiry into the propriety of representation of Respondents by Texas Rural Legal Aid, Inc. To the contrary, this is a case where discovery was still in progress and the District Court was properly performing its function of supervising discovery matters. In that regard, the District Court, after due consideration of the issues involved, determined that Petitioners were entitled to discover information concerning the Respondents' citizenship and immigration status. This is certainly not a fact

situation that demands the issuance of mandamus.

Compare the fact sitution in the instant case to the fact situation of In re Sessions, 672 F.2d 564 (5th Cir. 1982), a case wherein that Court denied mandamus regarding a District Court's ruling on a discovery matter. In Sessions, the Petitioner was confined in the penitentiary, convicted of capital murder. He sought an order from the District Court to take non-stenographic depositions. The District Court denied the request.

The Court of Appeals denied the petition for a writ of mandamus stating:

> "We hold that the Petitioner has not met his burden of demonstrating that he has a clear right to the relief sought nor has he established that the District Court had a clear duty to grant the motion."

Further, the Court stated:

> "Moreover, we are not persuaded that this is such an 'exceptional case where there is a clear abuse of discretion' which would justify

> the intervention of our supervisory power."

In re Sessions, supra at 567.

Even if all the matters as alleged by Respondents in the instant case are taken as correct, there are certainly no factors which show that Respondents have a clear right to the relief sought and that the District Court had a clear duty to deny the discovery sought by Petitioners.

Mandamus is not to be used when the most that could be claimed is that the District Court erred in ruling on matters within its jurisdiction. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed. 2d 152 (1964). Yet, even if all the allegations in Respondents' brief to the Court of Appeals are taken as admitted, that is the most that can be made of their claim.

As stated by the Court in In re Bankers Life & Casualty Co., 199 F.2d 593 (5th Cir.

1952); aff'd, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953):

> "Upon full consideration of the briefs and arguments on the motion to dismiss, the court is of the opinion that no fact or reason is stated showing that the relief by mandamus is an appropriate remedy. Without, therefore, determining or considering on the merits, whether the order complained of was rightly entered, the motion to dismiss the petition, because the relief prayed for is not appropriate, is granted and the petition is dismissed."

Such should have been the result in the instant case.

## II. RESPONDENTS DID NOT CARRY THE BURDEN OF SHOWING THAT THEY WERE ENTITLED TO A WRIT OF MANDAMUS

Under the law as stated by the Court, a party seeking a writ of mandamus must demonstrate that three elements co-exist:

1. No other adequate remedy available;
2. Clear right to relief sought; and,
3. Clear duty on part of Respondent to do the act in question.

In re Sessions, supra at 566.

## A. RESPONDENTS HEREIN HAD AN ALTERNATIVE ADEQUATE REMEDY AVAILABLE.

A petition for writ of mandamus must be denied where the party seeking the writ has an alternative adequate remedy available. Respondents, in their application to the Court of Appeals, asserted that they had no adequate remedy available to them other than mandamus. However, their reasoning to support this allegation was simply that the District Court's order was interlocutory in nature and not immediately appealable. The burden of the party seeking a writ of mandamus is to show that an appeal after a final judgment can "promise no more than 'a clearly inadequate remedy'". Donnelly v. Parker, 486 F.2d 402 (D.C. Cir. 1973). Donnelly involved an interlocutory discovery order that was unappealable [immediately unappealable], yet the Court of Appeals held that

such an order was not a basis for the issuance of a writ of mandamus.

Moreover, even if the District Court's order was unappealable, a denial of the writ would not foreclose Respondents' right in the event of a future appeal from a final judgment to demonstrate, if they could, that the order of the District Court amounted to reversible error. This is the precise position that the Court took when it denied the petition for writ of mandamus in In re Sessions, supra.

Even if Respondents could show that an appeal after a final judgment would be a clearly inadequate remedy, the District Court's order would nonetheless be reviewable through disobedience.

If Respondents' status is such that they are entitled to claim the Fifth Amendment privilege, they can do so or, as stated by the District Court in granting discovery:

> If for some reason you think it should be - that the plaintiffs for some reason have a reason why it should be held confidential, whether it's because they are here illegally or whatever, then go ahead and file a motion to that effect."
> (Appendix "K")

Respondents did not file a motion with the District Court, but instead, sought the drastic remedy of mandamus.

Because of the alternatives available to Respondents, a writ of mandamus was not the proper course of action in the instant case. National Right To Work Legal Defense v. Richey, 510 F.2d 1239 (D.C. Cir. 1975).

### B. RESPONDENTS DID NOT HAVE A CLEAR RIGHT TO THE RELIEF SOUGHT

#### 1. The Interrogatory Concerning The Citizenship And Immigration Status Of Respondents Is Relevant Or Reasonably Calculated To Lead To Discovery Of Admissible Evidence.

Respondents, in their complaint, allege rights under the Migrant and Seasonal

Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 et. seq., and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et. seq., and further allege that such rights have been violated by Petitioners. Respondents also allege that Petitioners violated an oral employment contract. To support their standing to bring this suit, Respondents allege that they are "migrant farm workers who reside in Texas". (Plaintiffs' Complaint - Appendix "F", page 2) None of these allegations are admitted by Respondents in their Answer (Appendix "G"); thus such allegations remain controverted. Therefore, potential issues to be determined at trial include the following:

(1) Whether Respondents are covered by AWPA and FLSA;

(2) If so, whether Petitioners violated AWPA and FLSA;

(3) If Respondents are covered by AWPA, whether they are covered as "migrant

agricultural workers" or as "seasonal agricultural workers";

(4) Whether Respondents reside in Texas or elsewhere;

(5) Whether a contract of employment existed between Respondents and Petitioners;

(6) If so, whether the contract aided Respondents in making an illegal entry into the United States and is therefore, void; and,

(7) Whether Petitioners violated the AWPA by hiring undocumented aliens.

Because of these issues and other issues that may arise upon discovery of the information sought by Petitioners, the inquiry into the citizenship and immigration status of Respondents is relevant and most certainly, reasonably calculated to lead to discovery of admissible evidence.

Moreover, Petitioners herein maintain that the inquiry is, not merely relevant, but

necessary in order for Petitioners to prepare a proper defense in the instant case.

### 2. The District Court Did Not Commit Error.

The District Court based its decision on the fact that Petitioners' interrogatory concerned information which may lead to relevant evidence. (Court's Order of July 28, 1986 - Appendix "I")

Respondents contended, and the Court of Appeals found, that the District Court erred because it allowed the propriety of representation to become an issue in the the underlying action. Although in issuing its ruling, the District Court made a comment regarding the propriety of representation, the District Court's ultimate decision to order Respondents to answer the interrogatory in question was based on the District Court's determination that the interrogatory would lead to relevant evidence.

The District Court, in so ruling, was clearly acting within the broad discretion available to it where pre-trial discovery matters are concerned. Paramount Film Distributing Corporation v. Civic Center Theatre, 333 F.2d 358 (10th Cir. 1964).

### 3. The District Court Acted Within Its Judicial Discretion.

A petition for writ of mandamus must be denied if the District Court acted within its judicial discretion, notwithstanding that it may have committed error. Petitioners herein contend that the District Court's ruling was correct. However, even if it could be shown that the District Court committed error in its ruling, a writ of mandamus cannot be used to correct an error in the exercise of judicial power. Will v. United States, supra, Paramount, supra. Such a writ is reserved for extreme situations. J.H. Cohn & Co. v. American Appraisal Associates, Inc., 628 F.2d

994 (7th Cir. 1980). In J.H. Cohn & Co., the Court stated that:

> "A writ of mandamus is reserved for extraordinary situations because of the interest in discouraging piecemeal appeals, which is in line with the congressional judgment that, as a general rule, appellate review should await the entry of final judgment by the trial court". J. H. Cohn & Co., supra at 997.

J.H. Cohn & Co. did not involve a district judge who had ruled on a discovery motion, but a judge who had refused to certify a class action. The Court of Appeals in J.H. Cohn & Co. denied the petition for writ of mandamus, emphasizing that the Petitioner must "demonstrate a clear and indisputable right for the drastic remedy of mandamus." J.H. Cohn & Co., supra at 997.

In order to demonstrate such a right, Petitioners must first show, inter alia, that the District Court not only committed error, but that such error amounted to an abuse of discretion. Moreover, to warrant the issuance of the writ, there must be a clear

abuse of discretion or usurpation of judicial power, lest Courts find themselves reviewing unappealable orders on the mere ground that they may be erroneous. Iowa Beef Processor, Inc. v. Bagley, 601 F.2d 949 (8th Cir. 1979).

A writ of mandamus has been restricted to those situations in which the District Court has taken an action which it has no power to take or when the District Court has abused its discretion to the point that there is a "usurpation of power" which will justify issuing a writ of mandamus. Schlagenhauf v. Holder, supra; Kerr v. United States Dist. Ct. for No. Dist. of Cal., supra; and Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977).

As previously stated, Petitioners herein sought information regarding Respondents' citizenship or immigration status and Respondents refused to disclose such information. Petitioners filed a motion to compel

responses. Therefore, the District Court had, not only the power to rule on the motion, but the duty to rule. The District Court did not abuse its discretion by ruling against Respondents. A writ of mandamus is not to be used to control the decision of the District Court as done by the Court of Appeals, but rather, it is to be used to confine a District Court to the sphere of its discretionary power. Schlagenhauf v. Holder, supra.

In this regard, the District Court has broad discretion in handling pre-trial discovery matters which are not reviewable in a mandamus action. City of Cleveland v. Krupansky, 619 F.2d 572 (6th Cir. 1980).

This discretionary power obviously includes the power to rule on pre-trial motions, including a motion to compel responses to interrogatories.

**4. Respondents Failed To Demonstrate Irreparable Harm.**

Even if it could be argued that the District Court abused its discretion in its ruling in this matter, Respondents also have the burden to demonstrate that harm will, in all likelihood, occur absent a writ of mandamus. Arthur Young & Co. v. United States District Court, 549 F.2d 686 (9th Cir. 1977). In Young, the Court stated:

> "Interference with the trial court's control over its own proceeding is not a matter to be undertaken lightly or on the basis of mere speculation by the parties or the reviewing court about what may occur at some future date."
> (emphasis added) Young supra at 692.

This statement is paticularly relevant in the instant case since any harm alleged is purely speculative at this stage of the proceedings.

Since Respondents in the case at bar failed to demonstrate, or even to allege, any hardship, let alone any irreparable harm which would befall them if they complied with the District Court's order, the Court of

Appeals erred in issuing the writ of mandamus. In re W.J. Estelle, Jr., 516 F.2d 480 (5th Cir. 1975). Although Respondents alluded to an invasion of privacy argument in their application; mere assertion of a constitutional violation is simply not sufficient to warrant the issuance of a writ of mandamus. Oswald v. McGarr, 620 F.2d 1190 (7th Cir. 1980).

**C. THE DISTRICT COURT HAD NO DUTY TO RULE IN FAVOR OF RESPONDENTS.**

In order for Respondents to be entitled to the issuance of a writ of mandamus, they must demonstrate that the District Court had a clear duty to deny the motion to compel a response to the subject interrogatory. The District Court properly based its decision on the fact that the answer to the interrogatory would lead to relevant evidence. The District Court has broad discretion in the area of pre-trial discovery. City of Cleveland v. Krupansky, supra. The Court of Appeals, by

issuing the writ of mandamus, is unduly and improperly curtailing the exercise of that discretion.

## III. THE COURT OF APPEALS BASED ISSUANCE OF THE WRIT OF MANDAMUS ON THE ERRONEOUS FINDING THAT PETITIONERS' REASON FOR INQUIRING INTO RESPONDENTS' CITIZENSHIP OR IMMIGRATION STATUS WAS TO DETERMINE RESPONDENTS' ELIGIBILITY FOR REPRESENTATION BY A LEGAL SERVICES CORPORATION GRANTEE.

In its opinion, the Court of Appeals stated that the District Court granted discovery as to the interrogatory in question based on two grounds: "First, a legal services corporation is not entitled to represent undocumented aliens, and second, there is an issue of coverage of undocumented aliens under the Migrant and Seasonal Agricultural Workers Protection Act and the Fair Labor Standards Act." The Court then

proceeded to address the above stated grounds. Further, the Court stated that the information sought is "...completely irrelevant to the case before it and was information that could inhibit Petitioners in pursuing their rights...".

With all due respect to the Court of Appeals, Petitioners take issue with the opinion of the Court of Appeals and issuance of the writ of mandamus on the grounds stated.

While Petitioners concede that the issue of whether a legal services corporation under the Legal Services Corporation Act, 42 U.S.C. § 2996 et seq. is prohibited from representing undocumented aliens is not an issue that may be litigated in the District Court, Petitioners never attempted to justify discovery of Respondents' citizenship or immigration status on that basis. The propriety of representation of Respondents by Texas Rural Legal Aid, Inc. is simply not an issue that

was before the District Court nor the Court of Appeals.

## CONCLUSION

Respondents herein did not seek the writ of mandamus to prohibit the District Court from delving into the authority of Texas Rural Legal Aid, Inc. to represent Respondents. Rather, the writ of mandamus that Respondents sought and that the Court of Appeals granted is much broader, preventing Petitioners from discovering evidence that: (1) may lead to admissible evidence; (2) constitutes relevant evidence; and (3) is essential to Petitioners if they are to be afforded a fair trial.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this petition for writ of certiorari be granted and that the Court overrule the Court of Appeals' issuance of a writ of mandamus to the District Court in the instant case.

Respectfully Submitted,

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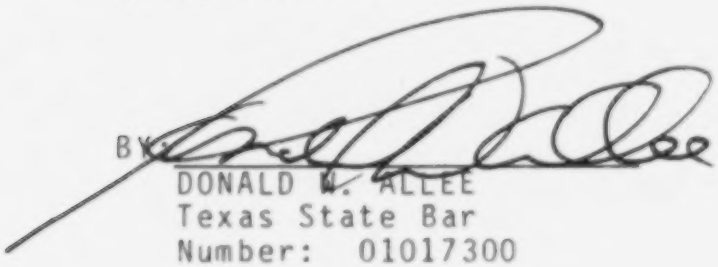
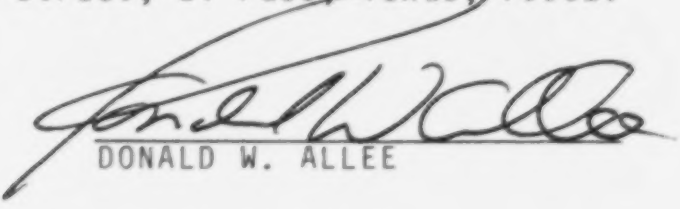
BY: 
DONALD W. ALLEE
Texas State Bar
Number: 01017300

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

On this 11th day of September, 1987, I provided three copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to all parties or their counsel of record by depositing the same in the U.S. mail, first-class postage prepaid, addressed to Jose R. Rodriguez, Texas Rural Legal Aid, Inc., 1220 North Stanton Street, El Paso, ~~Texas,~~ 79902.


DONALD W. ALLEE

No. 87-1609

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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GRIFFIN AND BRAND OF McALLEN, INC., ET. AL.,

PETITIONERS,

v.

MARGARITO REYES, ET. AL.,

RESPONDENTS.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## VOLUME II - APPENDICES

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APPENDIX A

Opinion - In re Margarito Reyes, et. al., 814 F.2d 168 (5th Cir. 1987)

**IN RE REYES**

In re Margarito REYES, et al., Petitioners.
NO. 86-1773.

United States Court of Appeals, Fifth Circuit.

March 30, 1987.

Migrant farm workers bringing action under Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act sought writ of mandamus directing the United States District Court for the Southern District of Texas, Ricardo H. Hinojosa, J., to withdraw discovery order. The Court of Appeals held that: (1) issue of whether legal service corporation under Legal Services Corporation Act could represent undocumented aliens was not subject to litigation in action brought by migrant workers assert-

ing rights under Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standard Act; (2) inquiry into documentation of aliens for purposes of determining coverage under Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act was improper; and (3) issuance of writ of mandamus was warranted.

**WRIT OF MANDAMUS GRANTED.**

Edith H. Jones, Circuit Judge, filed dissenting opinion.

**1. Labor Relations @ 1472**

Issue of whether legal service corporation under Legal Services Corporation Act could represent undocumented aliens was not subject to litigation in action brought by migrant workers asserting rights under Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., Migrant and Seasonal Agricultural Worker Protection Act, § 2 et seq., 29 U.S.C.A. § 201 et seq.,

29 U.S.C.A. § 1801 et seq.; Legal Services Corporation Act of 1974, §§ 1001 et seq., 1006(b)(1)(B), as amended, 42 U.S.C.A. §§ 2996 et seq., 2996e(b)(1)(B).

**2. Labor Relations @ 1520**

**Licenses @ 39.44**

Inquiry into documentation of aliens for purposes of determining coverage under Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act was improper in action brought by migrant farm workers alleging rights under both Acts. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Migrant and Seasonal Agricultural Worker Protection Act, § 2 et seq., 29 U.S.C.A § 1801 et seq.

**3. Federal Courts @ 556**

Discovery order generally is not appealable.

**4. Mandamus @ 32**

Issuance of writ of mandamus directing district court to withdraw that portion of

its discovery order requiring migrant farm workers to answer questions concerning citizenship and alienage, including alienage status as documented or undocumented, was warranted in action brought by migrant farm workers asserting claims under Migrant and Seasonal Agricultural Worker Protection Act and Fair Labor Standards Act; information sought was completely irrelevant to case before court, could inhibit farm workers in pursuing their rights because of possible collateral wholly unrelated consequences, and order opened for litigation issues which were not present in case. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Migrant and Seasonal Agricultural Worker Protection Act, § 2 et seq., 29 U.S.C.A. § 1801 et seq.; Legal Services Corporation Act of 1974, §§ 1001 et seq., 1006(b)-(1)(B), as amended, 42 U.S.C.A. §§ 2996 et seq., 2996e(b)(1)(B); 28 U.S.C.A. § 1651(a).

---

Petition for Writ of Mandamus.

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

BY THE COURT:

Margarito Reyes and other petitioners seek a writ of mandamus to direct the district court to withdraw a discovery order. Petitioners have brought suit claiming rights under the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801, et seq. (AWPC) and the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (FLSA). Petitioners also claim breach of contract of employment under Texas law. Petitioners as migrant farm workers are represented by the Texas Rural Legal Aid, a legal services corporation recipient within the meaning of the Legal Services Corporation Act, 42 U.S.C. §§ 2996 et seq. (LSCA).

As part of a discovery order the district court directed petitioners to respond to the following questions:

> Are you a citizen of the United States? If so, were you born in the United States? If so, please state where you were born and your birthdate. If you are a naturalized citizen of the United States, please state where and when you became a citizen of the United States. If you are not a citizen of the United States, please state your immigration status.

The district court granted discovery as to these matters on two grounds. First, a legal services corporation is not entitled to represent undocumented aliens, and second, there is an issue of coverage of undocumented aliens under the Migrant and Seasonal Agricultural Workers Protection Act and the Fair Labor Standards Act.

[1] First, the issue as to whether a legal services corporation under the LSCA can represent undocumented aliens is not an issue which is subject to litigation in this case. Congress was clear, precise, and adamant with respect to this issue. It provided in 42 U.S.C. § 2996e(b)(1)(B):

> No question of whether representation is authorized under this subchapter, or the rules, regulations or quidelines promul-

gated pursuant to this subchapter shall be considered in, or affect the final disposition of, any proceeding in which a person is represented by a recipient or an employee of a recipient.

There is no authority, therefore, to inquire into the documentation of aliens to determine whether the Texas Rural Legal Aid, Inc., Farm Worker Division, has authority to represent the petitioners in this case. In holding that the inquiry was relevant for this purpose, the district court was in error.

[2] Second, it is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant. An employee is "any individual employed by an employer." FLSA, 29 U.S.C. § 203(e)(1). The same thing is true with respect to claiming the benefits of the AWPA. The statute covers "an individual" employed in agricultural work, AWPA, 29 U.S.C. § 1802(8)(A), unless the aliens in-

volved are in that class of aliens referred to as "H-2" workers, as defined under 8 U.S.C. § 1101(a)(15)(H)(ii). H-2 workers constitute a very narrow class of aliens under a specific work program. There is no issue raised in this case concerning the possibility that petitioners are H-2 workers. The district court, therefore, was also in error in concluding that inquiry into the documentation of alien petitioners for purposes of determing coverage under the FLSA and AWPA was warranted.

[3] A discovery order generally is not appealable. Honig v. E.I duPont de Nemours & Co., 404 F.2d 410 (5th Cir. 1968). The district court, however, in this case ordered discovery as to information which was completely irrelevant to the case before it and was information that could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry

into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case.

[4] A writ of mandamus is justified as requested by petitioners under the All Writs Act, 28 U.S.C. § 1651(a), since its purpose here is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction...." Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). As we said en banc in United States v. Denson, 603 F.2d 1143, 1145 (5th Cir. 1979), "[W]hen the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescirbed authority, the court should issue the writ almost as a matter of course." Schlazenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), stands for the proposition that "there has been a general loosening of the federal attitude toward

mandamus and the discovery cases are not unaffected by this." Wright & Miller, 8 FEDERAL PRACTICE & PROCEDURE § 2006. See also Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), cert. denied, 421 U.S. 914, 95 S.Ct. 1573, 43 L.Ed.2d 780 (1975), which held that a writ of mandamus was appropriate to vacate a discovery order in an antitrust case. The order required plaintiffs to disclose current financial statements as well as fee arrangements with attorneys. The writ was issued on the ground that the order went beyond a Supreme Court decision and interfered with Fed. R. Civ. P. 23 on class actions. If mandamus lies in such an antitrust context, there is much stronger justification in this case where there is no possible relevance and the discovery could place in jeopardy unrelated personal status matters.

The procedural requirements of Fed.R. App.P. 21 having been fully met in this case, it is ORDERED that a writ of mandaums issue

directing the district court to withdraw that portion of its discovery order requiring petitioners to answer questions concerning citizenship and alienage, including alienage status as documented or undocumented.

**WRIT OF MANDAMUS GRANTED.**

EDITH H. JONES, Circuit Judge, dissenting:

The majority takes the extraordinary step of granting a writ of mandamus on a discovery matter because it considers the plaintiffs' citizenship status "completely irrelevant to the case." Cf. In re Sessions, 672 F.2d 564 (5th Cir. 1982); Kerr v. U.S. District Court, 511 F.2d 192 (9th Cir. 1975), affirmed, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976) (refusing to issue mandamus on discovery matters). Mandamus should issue only "to compel the performance of a legal duty which is free of doubt." Winningham v. HUD, 512 F.2d 617, 620 (5th Cir. 1975). Because I disagree that such information is without a

without a shred of relevancy and that the district judge manifestly was without jurisdiction to permit the discovery, I respectfully dissent.

First, a matter with which I have no quarrel. The majority accurately reject the district court's justification of this discovery insofar as it relates to the authority of the Texas Rural Legal Aid Association to represent undocumented aliens. Although employees of the Legal Services Corporation are prohibited from representing undocumented aliens, 45 C.F.R. § 1626 (1986), the Legal Services Corporation Act does not permit inquiry for this purpose. It should be noted, however, that the defendants have never sought to justify their discovery request on that basis.

Assuming plaintiffs may sue under the AWPA, the nature of their AWPA action makes their immigrtion status relevant. Plaintiffs allege that they are migrant farm workers, as opposed to seasonal farm workers. The key

distinction between the AWPA definitions of migrant and seasonal farm workers is that migrant workers are those who are required to be absent overnight from their permanent place of residence. 29 U.S.C. § 1802(8)(A). The plaintiffs' permanent place of residence is thus a material issue in this case. The plaintiffs' immigration and residency status, while not dispositive, clearly could lead to the discovery of relevant evidence in this area. It is not uncommon for Mexican citizens to have their permanent residence South of the Border, but to live with relatives or for short periods of time in the U.S. while work is available. Plaintiffs who live thus would not be "migrant" workers under the AWPA, because they would not be away overnight from their permanent residence in Mexico, but only from their temporary quarters.

I also take issue with the majority's conclusion that the AWPA and the Fair Labor

Standards Act do not distinquish between citizens and illegal alien employees. Previously, no court has explicitly permitted an undocumented alien to recover the damages and penalties provided for in those statutes. Moreover, the AWPA specifically prohibits the employment of undocumented aliens by farmers and farm labor contractors. 29 U.S.C. §1816. The entire thrust of the AWPA is to enhance and create minimum standards for the working conditions of American and a very limited class of documented foreign workers employed in domestic agriculture. To the extent the statute's prohibition on hiring undocumented aliens is intended to discourage illegal immigration of farm workers from other countries, that purpose is undercut by allowing those farm workers to sue and recover benefits on a par with legally employed workers. The impact of the alien hiring prohibition has not been definitively briefed by either party at any time, and the district court

afforded discovery of plaintiffs' immigration status precisely because he felt the issue to be open. So do I. At a time when the problem of illegal immigration into this country is so severe, the competition for entry-level employment along the south Texas border fierce, and the economic pressures on the agriculture industry stringent, I believe we should not rush to broaden farmers' liability in the context of a factually and legally undeveloped mandamus proceeding. At the very least, it is imprudent to mandamus the district court in an area of "doubtful law." See In re Cajun Electric Power Cooperative, Inc., 791 F.2d 353, 365 (5th Cir. 1986) (mandamus proper only where there is a "clear and indisputable abuse of discretion or usurpation of judicial power"); Sporck v. Peil, 759 F.2d 312, 314 (3d Cir. 1985), cert. denied, --- U.S.---, 106 S.Ct. 232, 88 L.Ed.2d 230 (1986) (mandamus available only where there is a "clear error of law"); United States v.

Mehrmanesh, 652 F.2d 766, 770 (9th Cir. 1980) (mandamus inappropriate in case involving a statute devoid of precedent and subject to differing interpretations).

Finally, I am not unsympathetic to the claim that revelations of immigration status may be harmful to plaintiffs even if it is material to the defense. Such an evaluation is, however, within the district court's discretion in the first instance. Any extremely severe collateral consequences of the discloures might be remedied by a protective order. Fed.R.Civ. Proc. 26(c).

As the information requested is relevant to material issues in the case, the district court cannot be said to have been acting beyond its lawful authority in compelling its production. The extraordinary remedy of a writ of mandamus is thus not justified.

I DISSENT.

APPENDIX B

Order denying Petition for Rehearing, In re Margarito Reyes, et. al., 814 F.2d 168 (5th Cir. 1987)

IN RE REYES

**In re Margarito REYES, et al., Petitioners.**
**NO. 86-1773.**

United States Court of Appeals,
Fifth Circuit.

June 16, 1987.

Appeal from the United States District Court for the Southern District of Texas; Ricardo H. Hinojosa, District Judge.

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

(Opinion March 30, 1987, 5th Cir. 1987, 814 F.2d 168)

**PER CURIAM:**

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED.**

To avoid any possibility that the writ of mandamus directing the district court to withdraw a portion of its discovery order is a determination of issues on the merits of the case, we insert the following paragraph at the conclusion of our opinion in In Re Reyes, 814 F.2d 168 (5th Cir. 1987):

> In issuing the writ of mandamus we do not undertake to foreclose in any way consideration on the merits of whether these petitioners are entitled to claim coverage and benefits under the FLSA and the AWPA.

Judge Edith Hollan Jones continues to dissent from our order. Her opinion appears at 814 F.2d 171.

# APPENDIX C

Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. sec 1801 et seq

## CHAPTER 20--MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

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(f) Prohibition on knowingly providing false or misleading information to workers.

(g) Form and language requirements.

1822. Wages, supplies, and other working arrangements.

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(a) Written disclosure requirements imposed upon recruiters.

(b) Posting requirements imposed upon employers.

(c) Recordkeeping and information requirements imposed upon employers.

(d) Furnishing of records by farm labor contractor; maintenance of records by recipient.

(e) Prohibition on knowingly providing false or misleading information to workers.

(f) Form and language requirements.

1832. Wages, supplies, and other working arrangements.

(a) Payment of wages.

(b) Purchase of goods or services by worker.

(c) Violation of terms of working arrangement.

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**§ 1801. Congressional statement of purpose**

It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal agricultural wokers, agricultural associations, and agricultural employers.

(Pub.L. 97-470, § 2,Jan. 14, 1983, 96 Stat. 2584.)

**§1802. Definitions**

As used in this chapter --

(1) The term "agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(2) The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(4) The term "day-haul operation" means the assembly of workers at a pick-up point waiting to be hired and employed, transportation of such workers to agricultural employ-

ment, and the return of such workers to a drop-off point on the same day.

(5) The term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act [29 U.S.C.A. § 201 et seq.].

(6) The term "farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(7) The term "farm labor contractor" means any person, other than any agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(8)(A) Except as provided in subparagraph (B), the term "migrant agricultural worker"

means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(B) The term "migrant agricultural worker" does not include --

(i) Any immediate family member of an agricultural employer or a farm labor contractor; or

(ii) Any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 1101(a)(15)(H)(ii)(a) and 1184(c) of Title 8.

(9) The term "person" means any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(10)(A) Except as provided in subparagraph (B), the term "seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other

temporary nature and is not required to be absent overnight from his permanent place of residence--

(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and trasporated, or caused to be transported in or from the place of employment by means of a day-haul operation.

(B) the term "seasonal agricultural worker" does not include--

(i) any migrant agricultural worker,

(ii) any immediate family member of an agricultural employer or a farm labor contractor; or

(iii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under section 1101 (a)(15)(H)(ii)(a) or 1184(c) of Title 8.

(11) The term "Secretary" means the Secretary of Labor or the Secretary's authorized representative.

(12) The term "State" means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

(Pub.L. 97-470, § 3, Jan. 14, 1983, 96 Stat. 2584)

**§1803. Applicability of Chapter**

(a) The following persons are not subject to this chapter.

**(1) Family business exemption.** -Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such opera-

tion and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

**(2) Small business exemption.** -Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable.

**(3) Other exemptions.** -(A) any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker.

(B) Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (with-

out regard to the exclusion of agricultural employees in that Act (29 U.S.C.A. § 141 et seq.]) or as defined under applicable State labor relations law.

(C) Any nonprofit charitable organization or public or private nonprofit educational institution.

(D) Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(E) Any custom combine, hay harvesting, or sheep shearing operation.

(F) Any custom poultry harvesting, breeding, debeaking, desexing, or health service operation provided the employees of the operation are not regularly required to be away from their permanent place of residence

other than during their normal working hours.

(G)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transporation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this sub-

paragraph by a person who is exempt under such clause.

(H)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transporation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(I) Any employee of any person described in subparagraphs (A) through (H)

when performing farm labor contracting activities exclusively for such person.

(b) Subchapter I of this chapter does not apply to any agricultural employer or agricultural association or to any employee of such an employer or association.

(Pub.L. 97-470, § 4, Jan. 14, 1983, 96, Stat. 2585)

## SUBCHAPTER I--FARM LABOR CONTRACTORS

### §1811. Certificate of registration required

**(a) Persons engaged in any farm labor contracting activity**

No person shall engage in any farm labor contracting activity, unless such person has a certificate of registration from the Secretary specifying which farm labor contracting activities such person is authorized to perform.

**(b) Hire, employ, or use of any individual to perform farm labor contracting activities**

**by farm labor contractor; liability of farm labor contractor for violations.**

A farm labor contractor shall not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of the farm labor contractor employer, which authorizes the activity for which such individual is hired, employed, or used. The farm labor contractor shall be held responsible for violations of this chapter or any regulation under this chapter by any employee regardless of whether the employee possesses a certificate of registration based on the contractor's certificate of registration.

**(c) Possession and exhibition of certificate**

Each registered farm labor contractor and registered farm labor contractor employee shall carry at all times while engaging in

farm labor contracting activities a certificate of registration and, upon request, shall exhibit that certificate to all persons with whom they intend to deal as a farm labor contractor or farm labor contractor employee.

**(d) Refusal or failure to produce certificate**

The facilities and the services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et seq.), known as the Wagner-Peyser Act, shall be denied to any farm labor contractor upon refusal or failure to produce, when asked, a certificate of registration.

(Pub.L. 97-470, Title I, § 101, Jan. 14, 1983, 96 Stat. 2587)

**§ 1812. Issuance of certificate of registration**

The Secretary, after appropriate investigation and approval, shall issue a certificate of registration (including a certificate of registration as an employee of a farm

labor contractor) to any person who has filed with the Secretary a written application containing the following:

(1) a declaration, subscribed and sworn to by the applicant, stating the applicant's permanent place of residence, the farm labor contracting activities for which the certificate is requested, and such other relevant information as the Secretary may require;

(2) a statement identifying each vehicle to be used to transport any migrant or seasonal agricultural worker and, if the vehicle is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with the requirements of section 1841 of this title with respect to each such vehicle;

(3) A statement identifying each facility or real property to be used to house any migrant agricultural worker and, if the facility or real property is or will be owned or controlled by the applicant, documentation

showing that the applicant is in compliance with section 1823 of this title with respect to each such facility or real property;

(4) a set of fingerprints of the applicant; and

(5) a declaration, subscribed and sworn to by the applicant, consenting to the designation by a court of the Secretary as an agent available to accept service of summons in any action against the applicant, if the applicant has left the jurisdiction in which the action is commenced or otherwise has become unavailable to accept service.

(Pub.L. 97--470, Title I, § 102, Jan. 14 1983, 96 Stat. 2587.)

**§1813. Registration determinations**

**(a) Grounds for refusal to issue or renew, suspension, or revocation of certificate**

In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration (including a certificate of registration

as an employee of a farm labor contractor) if the applicant or holder--

(1) has knowingly made any misrepresentation in the application for such certificate;

(2) is not the real party in interest in the application or certificate of registration and the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify under this section for a certificate;

(3) has failed to comply with this chapter or any regulation under this chapter;

(4) has failed--

(A) to pay any court judgment obtained by the Secretary or any other person under this chapter or any regulation under this chapter or under the Farm Labor Contractor Registration Act of 1963 [7 U.S.C.A. § 2041 et seq.] or any regulation under such Act, or

(B) to comply with any final order issued by the Secretary as a result of a violation of this chapter or any regulation under this chapter or a violation of the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act;

(5) has been convicted within the preceding five years--

(A) of any crime under State or Federal law relating to gambling, or to the sale, distribution or possession of alcoholic beverage, in connection with or incident to any farm labor contracting activities; or

(B) of any felony under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assualt which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally; or

(6) has been found to have violated paragraph (1) or (2) of section 1324a(a) of Title 8.

**(b) Administrative review procedures applicable**

(1) The person who is refused the issuance or renewal of a certificate or whose certificate is suspended or revoked under subsection (a) of this section shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of the refusal, suspension, or revocation. In such hearing, all issues shall be determined on the record pursuant to section 554 of Title 5. If no hearing is requested as herein provided, the refusal, suspension, or revocation shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary

modifies or vacates the decision. Notice of intent to modify or vacate the decision of the aministrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

**(c) Judicial review procedures applicable**

Any person against whom an order has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the order

was based. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of Title 5. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of Title 28.

(Pub.L. 97-470, Title I, § 103, Jan. 14, 1983, 96 Stat. 2588.)

**§ 1814. Transfer or assignment; expiration; renewal**

**(a) Transfer or assignment prohibited**

A certificate of registration may not be transfered or assigned.

**(b) Expiration; renewals**

(1) Unless earlier suspended or revoked, a certificate shall expire twelve months from the date of issuance, except that (A) certificates issed under this chapter during the period beginning December 1, 1982, and ending November 30, 1983, may be issued for a period

of up to twenty-four months for the purpose of an orderly transition to registration under this chapter, (B) a certificate may be temporarily extended by the filing of an application with the Secretary at least thrity days prior to its expiration date, and (C) the Secretary may renew a certificate for additional twelve-month periods or for periods in excess of twelve months but not in excess of twenty-four months.

(2) Eligibility for renewals for periods of more than twelve months shall be limited to farm labor contractors who have not been cited for a violation of this chapter, or any regulation under this chapter, or the Farm Labor Contractor Registration Act of 1963 [7 U.S.C.A. § 2041 et seq.], or any regulation under such Act, during the preceding five years.

(Pub.L. 97-470, Title I, § 104, Jan. 14, 1983, 96 Stat. 2589.)

**§ 1815. Notice of address change; amendment of certificate of registration**

During the periods for which the certificate of registration is in effect, each farm labor contractor shall--

(1) provide to the Secretary within thirty days a notice of each change of permanent place of residence; and

(2) apply to the Secretary to amend the certificate of registration whenever the farm labor contractor intends to --

(A) engage in another farm labor contracting activity,

(B) use, or cause to be used, another vehicle than that covered by the certificate to transport any migrant or seasonal agricultural worker, or

(C) use, or cause to be used, another real property or facility to house any migrant agricultural worker than that covered by the certificate.

(Pub.L. 97-470, Title I, § 105, Jan. 14, 1983, 96 Stat. 2589.)

**§1816. Prohibition against employing illegal aliens**

**(a) Prohibitions on farm labor contractor**

No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.

**(b) Compliance by farm labor contractor**

A farm labor contractor shall be considered to have complied with subsection (a) of this section if the farm labor contractor demonstrates that the farm labor contractor relied in good faith on documentation prescribed by the Secretary, and the farm labor contractor had no reason to believe the individual was an alien referred to in subsection (a) of this section.

(Pub.L. 97--470, Title I, § 106, Jan. 14, 1983, 96 Stat. 2589)

§1816 Repealed. Pub.L. 99--603, Title I, § 101(b)(1)(C), Nov. 6, 1986, 100 Stat. 3372

Section, Pub.L. 97-470, Title I, § 106, Jan. 14, 1983, 96 Stat. 2589, prohibited the employment of illegal aliens by farm labor contractors. See section 1324a of Title 8, Aliens and Nationality.

Effective Date of Repeal. Repeal applicable to the employment, recruitment, referral, or utilization of the services of individuals occurring on or after the first day of the seventh month beginning after Nov. 6, 1986.

**SUBCHAPTER II--MIGRANT AGRICULTURAL WORKER PROTECTIONS**

**§ 1821. Information and recordkeeping requirements**

**(a) Written disclosure requirements imposed upon recruiters**

Each farm labor contractor, agricultural employer, and agricultural association which recruits any migrant agricultural worker shall ascertain and disclose in writing to each such worker who is recruited for

employment the following information at the time of the worker's recruitment:

(1) the place of employment;

(2) the wage rate to be paid;

(3) the crops and kinds of activities on which the worker may be employed;

(4) the period of employment;

(5) the transporation, housing, and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(6) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(7) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting

from any sales by such establishment to the workers.

**(b) Posting requirements imposed upon employers**

Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this chapter, including the right of a migrant agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or agricultural association, of the information described in subsection (a) of this section. Such employer shall provide upon request, a written statement of the information described in subsection (a) of this section.

**(c) Posting or notice requirements imposed upon housing providers**

Each farm labor contractor, agricultural employer, and agricultural association which provides housing for any migrant agricultural worker shall post in a conspicuous place or present to such worker a statement of the terms and conditions, if any, of occupancy of such housing.

**(d) Recordkeeping and information requirements imposed upon employers**

Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall--

(1) with respect to each such worker, make, keep, and preserve records for three years of the following information:

(A) the basis on which wages are paid;

(B) the number of piecework units earned, if paid on a piecework basis;

(C) the number of hours worked;

(D) the total pay period earnings;

(E) the specific sums withheld and the purpose of each sum withheld; and

(F) the net pay; and

(2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

**(e) Furnishing of records by farm labor contractor; maintenance of records by recipient**

Each farm labor contractor shall provide to any other farm labor contractor, and to any agricultural employer and agricultural association to which such farm labor contractor has furnished migrant agricultural workers, copies of all records with respect to each such worker which such farm labor contractor is required to retain by subsection (d)(1) of this section. The recipient of such records shall keep them for a period of three years from the end of the period of employment.

**(f) Prohibition on knowingly providing false or misleading information to workers**

No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any migrant agricultural worker concerning the terms, conditions, or existence of agricultural employment required to be disclosed by subsection (a), (b), (c), or (d) of this section.

**(g) Form and language requirements**

The information required to be disclosed by subsections (a) through (c) of this section to migrant agricultural workers shall be provided in written form. Such information shall be provided in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, and other languages, as necessary, which may be used in

providing workers with information required under this section.

(Pub.L. 97-470, Title II, § 201, Jan. 14, 1983, 96 Stat. 2590)

**§ 1822. Wages, supplies, and other working arrangements**

**(a) Payment of wages**

Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall pay the wages owed to such worker when due.

**(b) Purchase of goods or services by worker**

No farm labor contractor, agricultural employer, or agricultural association shall require any migrant agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.

**(c) Violation of terms of working arrangment**

No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant agricultural worker.

(Pub.L. 97-470, Title II, § 202, Jan. 14 1983, 96 Stat. 2591.)

**§ 1823. Safety and health of housing**

**(a) Compliance with substantive Federal and State safety and health standards**

Except as provided in subsection (c) of this section, each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

**(b) Certification that applicable safety and health standards met; posting of certificate of occupancy; retention of certificate and**

**availabilty for inspection and review; occupancy prior to inspection.**

(1) Except as provided in subsection (c) of this section and paragraph (2) of this subsection, no facility or real property may be occupied by any migrant agricultural worker unless either a State or local health authority or other appropriate agency has certified that the facility or property meets applicable safety and health standards. No person who owns or controls any such facility or property shall permit it to be occupied by any migrant agricultural worker unless a copy of the certification of occupancy is posted at the site. The receipt and posting of a certificate of occupancy does not relieve any person of responsibilities under subsection (a) of this section. Each such person shall retain the original certification for three years and shall make it available for inspection and review in accordance with section 1862 of this title.

(2) Notwithstanding paragraph (1) of this subsection, if a request for the inspection of a facility or real property is made to the appropriate State or local agency at least forty-five days prior to the date on which it is occupied by migrant agricultural workers and such agency has not conducted an inspection by such date, the facility or property may be so occupied.

**(c) Applicability to providers of housing on commercial basis to general public**

This section does not apply to any person who, in the ordinary course of that person's business, regularly provides housing on a commercial basis to the general public and who provides housing to migrant agricultural workers of the same character and on the same or comparable terms and conditions as is provided to the general public.

(Pub.L. 97-470, Title II, § 203, Jan. 14, 1983, 96 Stat. 2591)

SUBCHAPTER III--SEASONAL AGRICULTURAL WORKER PROTECTIONS

§ 1831. Information and recordkeeping requirements

(a) written disclosure requirements imposed upon recruiters

(a) Each farm labor contractor, agricultural employer, and agricultural association which recruits any seasonal agricultural worker (other than day-haul workers described in section 1802(10)(A)(ii) of this title) shall ascertain and, upon request, disclose in writing the following information when an offer of employment is made to such worker:

(A) the place of employment;

(B) the wage rates to be paid;

(C) the crops and kinds of activities on which the worker may be employed;

(D) the period of employment;

(E) the transportation and any other employee benefit to be provided, if any, and any costs to be charged for each of them;

(F) the existence of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment; and

(G) the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the farm labor contractor, the agricultural employer, or the agricultural association is to receive a commission or any other benefit resulting from any sales by such establishment to the workers.

(2) Each farm labor contractor, agricultural employer, and agricultural assocation which recruits seasonal agricultural workers through use of a day-haul operation described in section 1802(10)(A)(ii) of this title shall ascertain and disclose in writing to the worker at the place of recruitments the information described in paragraph (1).

**(b) Posting requirements imposed upon employers**

Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall, at the place of employment, post in a conspicuous place a poster provided by the Secretary setting forth the rights and protections afforded such workers under this cahpter, including the right of a seasonal agricultural worker to have, upon request, a written statement provided by the farm labor contractor, agricultural employer, or a agricultural association, of the information described in subsection (a) of this section. Such employer shall provide, upon request, a written statement of the information described in subsection (a) of this section.

**(c) Recordkeeping and information requirements imposed upon employers**

Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall--

(1) with respect to each such worker, make, keep, and preserve records for three years of the following information:

(A) the basis on which wages are paid;

(B) the number of piecework units earned, if paid on a piecework basis;

(C) the number of hours worked;

(D) the total pay period earnings;

(E) the specific sums withheld and the purpose of each sum withheld; and

(F) the net pay; and

(2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

**(d) Furnishing of records by farm labor contractor; maintenance of records by recipient**

(1) Each farm labor contractor shall provide to any other farm labor contractor and to any agricultural employer and agricultural association to which such farm labor

contractor has furnished seasonal agricultural workers, copies of all records with respect to each such worker which such farm labor contractor is required to retain by subsection (c)(1) of this section. The recipient of these records shall keep them for a period of three years from the end of the period of employment.

**(e) Prohibition on knowingly providing false or misleading information to workers**

No farm labor contractor, agricultural employer, or agricultural association shall knowingly provide false or misleading information to any seasonal agricultural worker concerning the terms, conditions, or existence of agricultural employment required to be disclosed by subsection (a), (b), or (c) of this section.

**(f) Form and language requirements**

The information required to be disclosed by subsections (a) and (b) of this section to seasonal agricultural workers shall be

provided in English or, as necessary and reasonable, in Spanish or other language common to seasonal agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, and other languages, as necessary, which may be used in providing workers with information required under this section.

(Pub.L. 97-470, Title III, § 301, Jan. 14, 1983, 96 Stat. 2592.)

**§ 1832. Wages, supplies, and other working arrangements**

**(a) Payment of wages**

Each farm labor contractor, agricultural employer, and agricultural association which employs any seasonal agricultural worker shall pay the wages owed to such worker when due.

**(b) Purchase of goods or services by worker**

No farm labor contractor, agricultural employer, or agricultural association shall require any seasonal agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.

**(c) Violation of terms of working arrangement**

No farm labor contractor, agricultural employer, ~~or agr~~icultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any seasonal agricultural worker.

(Pub.L. 97-470, Title III, § 302, Jan. 14, 1983, 96 Stat. 2593.)

**SUBCHAPTER IV--FURTHER PROTECTIONS FOR MIGRANT AND SEASONAL AGRICULTURAL WORKERS**

**§ 1841. Motor vehicle safety**

**(a) Mode of transportation subject to coverage**

(1) Except as provided in paragraph (2), this section applies to the transportation of any migrant or seasonal agricultural worker.

(2) This section does not apply to the transportation of any migrant or seasonal agricultural worker on a tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry.

**(b) Appilicability of standards, licensing, and insurance requirements; promulgation of regulations for standards; criteria, etc., for regulations; amount of insurance required**

(1) When using, or causing to be used, any vehicle for providing transportation to which this section applies, each agricultural employer, agricultural association, and farm labor contractor shall--

(A) ensure that such vehicle conforms to the standards prescribed by the Secretary under paragraph (2) of this subsection and other applicable Federal and State safety standards,

(B) ensure that each driver has a valid and appropriate license, as provided by State law, to operate the vehicle, and

(C) have an insurance policy or a liablity bond that is in effect which insures the agricultural employer, the agricultural association, or the farm labor contractor against liability for damage to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker.

(2)(A) For purpose of paragraph (1)(A), the Secretary shall prescribe such regulation as may be necessary to protect the health and safety of migrant and seasonal agricultural workers.

(B) To the extent consistent with the protection of the health and safety of migrant and seasonal agricultural workers, the Secretary shall, in promulgating regulations under subparagraph (A), consider, among other factors--

(i) the type of vehicle used,

(ii) the passenger capacity of the vehicle,

(iii) The distance which such workers will be carried in the vehicle,

(iv) the type of roads and highways on which such workers will be carried in the vehicle,

(v) the extent to which a proposed standard would cause an undue burden on agricultural employers, agricultural associations, or farm labor contractors.

(C) Standards prescribed by the Secretary under subparagraph (A) shall be in addition to, and shall not supersede or modify, any standard under part II of the Interstate

Commerce Act (49 U.S.C. 301 et seq.) [49 U.S.C.A. § 301 et seq.], or any successor provision of subtitle IV of Title 49, or regulations issued thereunder, which is independently applicable to transportation to which this section applies. A violation of any such standard shall also constitute a violation under this chapter.

(D) In the event that the Secretary fails for any reason to prescribe standards under subparagraph (A) by the effective date of this chapter, the standards prescribed under section 3102 of Title 49, relating to the transportation of migrant workers, shall, for purposes of paragraph (1)(A), be deemed to be the standards prescribed by the Secretary under this paragraph, and shall, as appropriate and reasonable in the circumstances, apply (i) without regard to the mileage and boundary line limitations contained in such section, and (ii) until superseded by stan-

dards actually prescribed by the Secretary in accordance with this paragraph.

(3) The level of the insurance required by paragraph (1)(C) shall be at least the amount currently required for common carriers of passengers under part II of the Interstate Commerce Act (49 U.S.C. 301 et seq.) [49 U.S.C.A. § 301 et seq.], and any successor provision of subtitle IV of Title 49, and regulations prescribed thereunder.

**c) Adjustments of insurance requirements in event of workers' compensation coverage**

If any agricultural employer, agricultural association, or farm labor contractor is the employer of any migrant or seasonal agricultural worker for purposes of a State workers' compensation law and such employer provides workers' compensation coverage for such worker in the case of bodily injury or death as provided by such State law, the following adjustments in the requirements of subsection

(b)(1)(c) of this section relating to having an insurance policy or liability bond apply:

(1) No insurance policy or liability bond shall be required of the employer, if such workers are transported only under circumstances for which there is coverage under such State law.

(2) An insurance policy or liability bond shall be required of the employer for circumstances under which coverage for the transportation of such workers is not provided under such State law.

**(d) Time for promulgation of regulations for standards implementing requirements; revision of standards**

The Secretary shall, by regulations promulgated in accordance with section 1861 of this title not later than the effective date of this chapter, prescribe the standards required for the purposes of implementing this section. Any subsequent revision of such standards shall also be accomplished by

regulation promulgated in accordance with such section.

(Pub.L. 97--470, Title IV, § 401, Jan. 14, 1983, 96 Stat. 2594.)

**§ 1842 Confirmation of registration**

No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized. In making that determination, the person may rely upon either possession of a certificate of registration, or confirmation of such registration by the Department of Labor. The Secreatry shall maintain a central public registry of all persons issued a certificate of registration.

(Pub.L. 97--470, Title IV, § 402, Jan. 14, 1983, 96 Stat. 2595.)

**§ 1843. Information on employment conditions**

Each farm labor contractor, without regard to any other provisions of this chapter, shall obtain at each place of employment and make available for inspection to every worker he furnishes for employement, a written statement of the conditions of such employment as described in section 1821(b) and 1831(b) of this title.

(Pub.L. 97--470, Title IV, § 403, Jan. 14, 1983, 96 Stat. 2595.)

**§ 1844. Compliance with written agreements**

**(a) Applicability to contracting activity or worker protection**

No farm labor contractor shall violate, without justification, the terms of any written agreements made with an agricultural employer or an agricultural association pertaining to any contracting activity or worker protection under this chapter.

**(b) Statutory liability**

Written agreements under this section do not relieve a person of any responsibility that such person would otherwise have under this chapter.

(Pub.L. 97--470, Title IV, § 404, Jan. 14, 1983, 96 Stat. 2596.)

## SUBCHAPTER V--GENERAL PROVISIONS

### Part A--Enforcement Provisions

**§ 1851. Criminal sanctions**

**(a) Violations of chapter or regulations**

Any person who willfully and knowingly violates this chapter or any regulation under this chapter shall be fined not more than $1,000.00 or sentenced to prison for a term not to exceed one year, or both. Upon conviction for any subsequent violation of this chapter or any regulation under this chapter, the defendant shall be fined not more than $10,000 or sentenced to prison for a term not to exceed three years, or both.

**(b) Violations of section 1816 of this title**

If a farm labor contractor who commits a violation of paragraph (1) or (2) of section 1324a of Title 8 has been refused issuance or renewal of, or has failed to obtain, a certificate of registration or is a farm labor contractor whose certificate has been suspended or revoked, the contractor shall, upon conviction, be fined not more than $10,000.00 or sentenced to prison for a term not to exceed three years, or both.

(As amended Pub.L. 99-603, Title I, § 101(b)(1)(D), Nov. 6, 1986, 100 Stat. 3372)

**§ 1852. Judicial enforcement**

**(a) Injunctive relief**

The Secretary may petition any appropriate district court of the United States for temporary or permanent injuctive relief if the Secretary determines that this chapter, or any regulation under this chapter, has been violated.

**(b) Control of civil litigation**

Except as provided in section 518(a) of Title 28, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this chapter, but all such litigation shall be subject to the direction and control of the Attorney General.

(Pub.L. 97-470, Title V, § 502, Jan. 14, 1983, 96 Stat. 2596.)

**§ 1853. Administrative sanctions**

**(a) Civil money penalties for violations; criteria for assessment**

(1) Subject to paragraph (2), any person who commits a violation of this chapter or any regulation under this chapter, may be assessed a civil money penalty of not more than $1,000 for each violation.

(2) In determining the amount of any penalty to be assessed under paragraph (1), the Secretary shall take in to account (A) the previous record of the person in terms of

compliance with this chapter and with comparable requirements of the Farm Labor Contractor Registration Act of 1963 [7 U.S.C.A. § 2041 et seq.], and with regulations promulgated under this chapter and such Act, and (B) the gravity of the violation.

**(b) Administrative review**

(1) The person assessed shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of Title 5. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of

the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

**(c) Judicial review**

Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set

aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of Title 5. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of Title 28.

**(d) failure to pay assessment; maintenance of action**

If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

**(e) Payment of penalties into Treasury of United States**

All penalties collected under authority of this section shall be paid into the Treasury of the United States.

(Pub.L. 97--470, Title V, § 503, Jan 14. 1983, 96 Stat. 2596)

**§1854. Private right of action**

**(a) Maintenance of civil action in district court by aggrieved person**

Any person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

**(b) Appointment of attorney and commencement of action**

Upon application by a complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action.

**(c) Award of damages or other equitable relief; amount; criteria; appeal**

(1) If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a Plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of

up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

(2) In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

(3) Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of Title 28.

(Pub.L. 97--470, Title V, § 504, Jan. 14, 1983, 96 Stat. 2597.)

**§ 1855. Discrimination prohibited**

**(a) Prohibited activities**

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to

testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter.

**(b) Proceedings for redress of violations**

A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, the Secretary shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to

restrain violations of subsection (a) of this section and order all appropriate relief, including rehiring or reinstatement of the workers, with back pay, or damages.

(Pub.L. 97--470, Title V, § 505, Jan. 14, 1983, 96 Stat. 2598.)

**§ 1856. Waiver of rights**

Agreements by employees purporting to waive or to modify their rights under this chapter shall be void as contrary to public policy, except that a waiver or modification of rights in favor of the Secretary shall be valid for purposes of enforcement of this chapter.

(Pub.L 97--470, Title V, § 506, Jan. 14, 1983, 96 Stat. 2598.)

**PART B--ADMINISTRATIVE PROVISIONS**

**§ 1861. Rules and regulations**

The Secretary may issue such rules and regulations as are necessary to carry out this chapter, consistent with the requirement of chapter 5 of Title 5.

(Pub.L 97--470, Title V, § 511, Jan. 14, 1983, 96 Stat. 2598.)

**§ 1862. Authority to obtain information**

**(a) Investigation and inspection authority concerning places, records, etc.**

To carry our this chapter the Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate, and in connection therewith, enter and inspect such places (including housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information to determine compliance with this chapter, or regualtions prescribed under this chapter.

**(b) Attendance and testimony of witnesses, and production of evidence; subpena authority**

The Secretary may issue subpenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may

administer oaths, examine witnesses, and receive edivence. For the purpose of any hearing or investigation provided for in this chapter, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

**(c) Prohibited activities**

It shall be a violation of this chapter for any person to unlawfully resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to this chapter during the performance of such duties.

(Pub.L. 97--470, Title V, § 512, Jan. 14, 1983, 96 Stat. 2598.)

**§ 1863. Agreements with Federal and State agencies**

**(a) Scope of Agreements**

The Secretary may enter into agreements with Federal and State agencies (1) to use their facilities and services, (2) to delegate, subject to subsection (b) of this section, to Federal and State agencies such authority, other than rulemaking, as may be useful in carrying out this chapter, and (3) to allocate or transfer funds to, or otherwise pay or reimburse, such agencies for expenses incurred pursuant to agreements under clause (1) or (2) of this section.

**(b) Delegation of authority pursuant to written State plan**

Any delegation to a State agency pursuant to subsection (a)(2) of this section shall be made only pursuant to a written State plan which --

(1) shall include a description of the functions to be performed, the methods of performing such functions, and the resources to be devoted to the performance of such functions; and
(2) provides assurances satisfactory to the Secretary that the State agency will comply with its description under paragraph (1) and that the State agency's performance of functions so delegated will be at least comparable to the performance of such functions by the Department of Labor.

(Pub.L. 97-470, Title V, §513, Jan. 14, 1983, 96 Stat. 2599)

## PART C--MISCELLANEOUS PROVISIONS

### § 1871. State laws and regulations

This chapter is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State Law and regulation.

(Pub.L. 97--470, Title V, § 521, Jan. 14, 1983, 96 Stat. 2599.)

### § 1872. Transition provision

The Secretary may deny a certificate of registration to any farm labor contractor, as

defined in this chapter, who has a judgment outstanding against him under the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), or is subject to a final order of the Secretary under that Act assessing a civil money penalty which has not been paid. Any findings under the Farm Labor Contractor Registration Act of 1963 may also be applicable to determinations of willful and knowing violations under this chapter.

(Pub.L. 97--470, Title V, § 522, Jan. 14, 1983, 96 Stat. 2599.)

# APPENDIX D

Fair Labor Standards Act, 29 U.S.C. sec. 201 et seq.

## CHAPTER 8--FAIR LABOR STANDARDS

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**§ 201. Short title**

This chapter may be cited as the "Fair Labor Standards Act of 1938".

June 25, 1938, C. 676, § 1, 52 Stat. 1060.

**§202. Congressional finding and declaration of policy**

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and

obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce amoung the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industies without substantially curtailing employment or earning power.

June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910; Apr. 8, 1974, Pub.L. 93--259, § 7(a), 88 Stat. 62.

**§ 203. Definitions**

As used in this chapter--

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(i) as a civilian in the military departments (as defined in section 102 of Title 5)

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who --

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an office holder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the

constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12) the raising of

livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform

the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part of ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate

consumer thereof other than a producer, manufacturer, or porcessor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directely essential to the production thereof, in any State.

(K) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent

employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order delcare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certifiate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive

child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: Provided, That the costs of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent

it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee; Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other faciilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 40 per centum of the applicable minimum wage rate, excpet that the amount of the increase on account of tips

determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building contruction, repair or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked--In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the

beginning or end of each workday which was exlcuded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an indepen-

dent contractor: Provided, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or

persons--

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban eletric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which--

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enter-

prise, other than an enterprise which is comprised exclusively of retail or service establishments and which is described in paragraph (2), whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is an enterprise which is comprised exclusively of one or more retail or service establishments, as defined in section 213(a)(2) of this title, and whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1978, whose annual gross volume of sales made or business done is not less than $275,000 (exclusive of excise taxes at the retail level which are separately stated), beginning July 1, 1980, whose annual gross volume of sales made or business done is not less than $325,000 (exclusive of excise taxes at the retail

level which are separately stated), and after December 31, 1981, whose annual gross volume of sales made or business done is not less than $362,500 (exclusive of excise taxes at the retail level which are separately stated);

(3) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(4) is engaged in the business of construction or reconstruction, or both;

(5) is engaged in the operation of a hospital, an institution primilary engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher edcuation (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

Notwithstanding paragraph (2), an enterprise which is comprised of one or more retail or service establishments, which on June 30, 1978, was subject to section 206(a)

(1) of this title, and which because of a change in the dollar volume standard in such paragraph prescribed by the Fair Labor Standards Amendments of 1977 is not subject to such section, shall, if its annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), pay its employees not less than the minimum wage in effect under such section on the day before such change takes effect and shall pay its employees in accordance with section 207 of this title. A violation of the preceding sentence shall be considered a violation of section 206 or 207 of this title, as the case may be.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or political subdivision of a State; or any interstate governmental agency.

June 25, 1938, c. 676, § 3, 52 Stat. 1060; 1946 Reorg.Plan No. 2, § 1(b), eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 3, 63 Stat. 911; May 5, 1961, Pub.L. 87-30, § 2, 75 Stat. 65; Sept. 23,

1966, Pub.L. 89-601, Title I, §§ 101-103, Title II, § 215(a), 80 Stat. 830-832, 837; June 23, 1972, Pub.L. 92-318, Title IX, § 906 (b)(2), (3), 86 Stat. 375; Apr. 8, 1974, Pub.L. 93-259, §§ 6(a), 13(e), 88 Stat. 58, 64; Nov. 1, 1977, Pub.L. 95-151, §§ 3(a), 9(a)-(c), 91 Stat. 1249, 1251.

**Amendments of Subsec. (m) Effective Jan. 1, 1979, and Jan. 1, 1980**

Pub.L. 95-151, § 3(b), Nov. 1, 1977, 91 Stat. 1249, provided that:

> "(1) Effective January 1, 1979, section 3(m) (29 U.S.C. 203(m)) [subsec. (m) of this section] is amended by striking out '50 percentum' and inserting in lieu thereof '45 per centum'.
>
> "(2) Effective January 1, 1980, such section [subsec. (m) of this section] is amended by striking out '45 per centum' and inserting in lieu thereof '40 percentum'."

**§ 204. Administration**

**Creation of Wage and Hour Division in Department of Labor; Administrator**

(a) There is created in the Department of Labor a Wage and Hour Division which shall be

under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with advice and consent of the Senate.

**Appointment, selection, classification, and promotion of employees by Administrator**

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction

and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

**Principal office of Administrator; jursidiction**

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all his powers in any place.

**Annual report to Congress; studies of exemptions to hour and wage provisions and means to prevent curtailment of employment opportunities**

(d)(1) The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and

including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the minimum wages and overtime coverage established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the cost of living and in productivity and the level of wages in maunfacturing, the ability of employers to absorb wage increase, and such other factors as he may deem pertinent. Such report shall also include a summary of the special certificates issued under section 214(b) of this title.

(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 213 of this title, and the extent to which

such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployement(such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals

after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 214 of this title.

**Study of effects of foreign production on umemployment; report to President and Congress**

(e) Whenever the Secretary has reason to believe that in any industry under this chapter the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report of his findings and determinations to the President and to the Congress; Provided, That he may also include in such

report information on the increased employment resulting from additional exports in any industry under this chapter as he may determine to be pertinent to such report.

**Employees of Library of Congress; administration of provisions by Civil Service Commission**

(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this chapter with respect to such individuals. Notwithstanding any other provision of this chapter, or any other law, the Civil Service Commission is authorized to administer the provisions of this chapter with respect to any individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be contrued to affect the

right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 216(b) of this title.

June 25, 1938, c. 676, § 4, 52 Stat. 1061; Oct. 26, 1949, c. 736, § 4, 63 Stat. 911; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972; Aug. 12, 1955, c. 867, § 2, 69 Stat. 711; May 5, 1961, Pub.L. 87-30, § 3, 75 Stat. 66; Apr. 8, 1974, Pub.L. 93-259, §§ 6(b), 24(c), 27, 88 Stat. 60, 72, 73.

**§ 205. Special industry committees for Puerto Rico and Virgin Islands**

**Establishment; residents as members of committees**

(a) The Administrator shall as soon as practicable appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 206 of this title to employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the

production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under said section to employees therein engaged in commerce or in the production of goods for commerce or employed in any enterprise engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees shall be subject to the provisions of section 208 of this title.

**Appointment of committee without regard to other laws pertaining to appointment and compensation of employees of United States; composition of committee**

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the Unites States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

**Quorum; compensation; employees**

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and

the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assitance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

**Submission of data to committees**

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cuase to be brought before it in connection with such matters any witnesses whom he deems material. An indus-

try committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

**Application of sections 206 and 208 to employees in Puerto Rico or Virgin Islands**

(e) The provisions of this section, section 206(c) of this title, and section 208 of this title shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests

of members of clubs. The minimum wage rate of such an employee shall be determined under this chapter in the same manner as the mimimum wage rate for employees employed in a State of the United States is determined under this chapter. As used in the preceding sentence, the term "State" does not include a territory or possession of the United States.

June 25, 1938, c. 676, § 5, 52 Stat. 1062; June 26, 1940, c. 432, § 3(c), 54 Stat. 615; Oct. 26, 1949, c. 736, § 5, 63 Stat. 911; Aug. 12, 1955, c. 867, § 5(a), 69 Stat. 711; May 5, 1961, Pub.L. 87-30, § 4, 75 Stat. 67; Apr. 8, 1974, Pub.L. 93-259, § 5(a), 88 Stat. 56.

**§ 206. Minimum wage**

**Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees**

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rate:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less

that the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representatives, shall have power to make such regulations or orders as necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to

prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each

such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but

not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

**Additional applicability to employees pursuant to subsequent amendatory provisions**

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974,

wages at the following rates: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1) of this section.

**Wage rates superseded by recommendation of special industry committee**

(c)(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1) of this section.

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour

shall, except as provided in paragraph (3), be increased--

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each suceeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased--

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effective January 1, 1979, and January 1 of each suceeding year--

(I) Until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate is not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, to whom the rate or rates prescribed by subsection (a)(5) of this section would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement)

paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by subparagraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) of this section which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under subsection (a)(1) of this section shall apply to such employee.

(4) Each minimum wage rate prescrived by or under paragraph (2) shall be in effect unless such minimum wage rate has been super-

seded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 208 of this title) fixing a higher minimum wage rate.

**Prohibition of sex discrimination**

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a

differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be upaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee repre-

sentation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

**Employees of employers providing contract services to United States**

(e)(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 214 of this tile (except subsections (a)(1) and (f) thereof) and the provisions of the Service Contract Act of 1965, every employer in an establishment providing linen supply service to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b) of this section, except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

**Employees in domestic service**

(f) Any employee--

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) of this section unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or

(2) who in any workweek--

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under subsection (b) of this section.

June 25, 1938, c. 676, § 6, 52 Stat. 1062; June 26, 1940, c. 432. § 3(e), (f), 54 Stat. 616; Oct. 26, 1949, c. 736, § 6, 63 Stat. 912; Aug. 12, 1955, c. 867, § 3, 69 Stat.

711; Aug. 8, 1956, c. 1035, § 2, 70 Stat. 1118; May 5, 1961, Pub.L. 87-30, § 5, 75 Stat. 67; June 10, 1963, Pub.L. 88-38, § 3, 77 Stat. 56; Sept. 23, 1966, Pub.L. 89-601, Title III, §§ 301-305, 80 Stat. 838, 839, 841; Apr. 8, 1974, Pub.L. 93-259, §§ 2-4, 5(b), 7(b)(1), 88 Stat. 55, 56, 62; Nov. 1, 1977, Pub.L. 95-151, § 2(a)-(d)(2), 91 Stat. 1245, 1246.

**§ 207. Maximum hours**

**(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions**

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in

excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products**

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed --

(3) by an independently owned and controlled local enterprise (including an enterprise

with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c),(d), Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66.

**(e) Definition of "regular rate" of employment**

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measur-

ed by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pur-

suant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs; (4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident,or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of

eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not

exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

**(f) Employment necessitating irregular hours of work**

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum

hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

**(g) Employment at piece rates**

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of over-

time premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

**(h) Extra compensation creditable toward overtime compensation**

Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

**(i) Employment by retail or service establishment**

No employer shall be deemed to have violated subsection (a) of this section by

employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

**(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill**

No employer engaged in the operation of a hospital or an establishment which is an

institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours and any workday and in excess of eighty hours in such fourteen--day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**(k) Employment by public agency engaged in fire protection or law enforcement activities**

No public agency shall be deemed to have violated subsection (a) of this section with

respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lessor of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar years 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 nours

(or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**(l) Employment in domestic service in one or more households**

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

**(m) Employment in tobacco industry**

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime

employment prescribed in such subsection, if such employee--

(1) is employed by such employer

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of

type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

**(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier**

In the case of an employee of an employer engaged in the business of operating a

street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

**(o) Compensatory time**

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compen-

satory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for

hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accurued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for pur-

poses of overtime compensation, and for which the employee is compensated at the employee's regular rate.

**(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution**

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employemnet for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the

public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity be a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(As amended Sept. 23, 1966, Pub.L. 89-601, Title II, §§ 204(c), (d), 212(b), Title IV, §§ 401-403, 80 Stat. 835-837, 841, 842; Apr. 8, 1974, Pub.L. 93-259, §§ 6(c)(I)(A) to (C), 7(b)(2), 9(a), 12(b), 19, 21(a), 88 Stat. 60,

62, 64, 66, 68; Nov. 14, 1985, Pub.L. 99-150, §§ 2(a), 3(a)-(c)(1), 99 Stat. 787, 789.)

**§ 208. Wage rate in Puerto Rico and the Virgin Islands**

(a) The policy of this chapter with respect to industries or enterprises in Puerto Rico and the Virgin Islands engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the objective of the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 206(a) of this title but for section 206(c) of this title. The Secretary shall, from time to time, convene an industry committee or committees, appointed pursuant to section 205 of this title, and any such industry committee--

(1) shall, from time to time, recommend the minimum wage rates to be paid by employers who are in Puerto Rico, in the

Virgin Islands, or in both places and who but for section 206(c) of this title would be subject to the minimum wage requirements of section 206(a)(1) of this title, and

(2) may, from time to time, recommend increases in the incremental increases authorized by section 206(c)(2) of this title.

The Administrator shall from time to time convene an industry committee or committies, appointed pursuant to section 205 of this title, and any such industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce in any such industry or classification therein. Minimum rates of wages established in accordance with

this section which are not equal to the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 206(a) of this title shall be reviewed by such a Committee once during each biennial period, beginning with the biennial period commencing July 1, 1958, except that the Secretary, in his discretion, may order an additional review during any such biennial period.

(b) Upon the convening of any such industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, shall after due notice hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this chapter. The committee shall recommend to

the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands; except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 206(a) or 206(b) of this title, which would be applicable but for Section 206(c) of this title, unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is

unable to pay that wage.

(c) The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of that in effect under paragraph (1) or (5) or section 206(a) of this title (as the case may be)) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines wil not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications and in determining the minimum wage rates for such classifications, no classifications shall be made, and no minimum wage rate shall be

fixed, solely on a regional basis, but the industry committee shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like comparable character by employers who voluntarily maintain minimum wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Secretary a report containing its findings of fact and recommendations with respect to the matters referred to it. Upon the filing of such report, the Secretary shall

publish such recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

(e) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

(f) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other menas as the Administrator deems reasonably calculated to give general notice to interested persons. June 25, 1938, c. 576, § 8, 52 Stat. 1064; Oct. 26, 1949, c. 736, § 8, 63 Stat. 915; Aug. 12, 1955, c. 867, §§ 4,

5(b)-(e), 69 Stat. 711, 712; Aug. 25, 1958, Pub.L. 85-750, 72 Stat. 844; May 5, 1961, Pub.L. 87-30, § 7, 75 Stat. 70.

**§ 209. Attendance of witnesses**

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees. June 25, 1938, c. 676, § 9, 52 Stat. 1065; 1946 Reorg.Plan No. 2, § 1, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095.

**§ 210. Court review**

**§ 210. Court review of wage orders in Puerto Rico and the Virgin Islands**

(a) Any person aggrieved by an order of the Secretary issued under section 208 of this title may obtain a review of such order

in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part. A copy of such petiton shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (including provision for the payment of an appropriate minimum wage rate), or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions

of law, and findings of fact by such industry committee when supported by substantial evidence shall be conclusive. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before such industry committee or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceedings before such industry committee, the court may order such additional evidence to be taken before an industry committee and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. Such industry committee may modify the initial findings by reason of the

additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive , and shall also file its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety of sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the

compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect. June 25, 1938, c. 676, § 10, 52 Stat. 1065; Aug. 12, 1955, c.867, §5(f), 69 Stat. 712; Aug. 28, 1958, Pub.L. 85-791§22, 72 Stat. 948.

**§ 211. Investigations, inspections, records, and homework regulations**

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provisions of this chapter. Except as provided in section 212 of this title and in

subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Secretary of Labor may, for the purpose of carrying out their respective functions and duties under this chapter, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this chapter or of any order issued

under this chapter shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administraor as he shall prescribe by regulation or order as necessary or appropriate for the emforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in

this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect. June 25, 1938, c.676, § 11, 52 Stat. 1066; 1946 Reorg. Plan NO.2, §1, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 9, 63 Stat. 916.

**§ 212. Child labor provisions**

(a) No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this

section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: And provided further, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211(a) of this title with respect to the employment of minors, and subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and

shall administer all other provisions of this chapter relating to oppressive child labor.

(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce. June 25, 1938, c. 676, § 12, 52 Stat. 1067; 1946 Reorg.Plan No. 2, § 1, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Oct. 26, 1949, c. 736, § 10, 63 Stat. 917; May 5, 1961, Pub.L. 87-30, § 8, 75 Stat. 70.

**§ 213. Exemptions**

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to ---

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary

schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions provisions of subchapter 11 of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activites); or

(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described

in Section 203(s) 5 of this title), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 203(s) of this title. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sale of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more that 33 1/3 per centum of

its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes as the re'ail establishment the goods that it sells: Provided, That more

than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fising operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his

employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent and (iii) is paid at the same piece rate as

employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less that four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23 (b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

(b) The provisions of section 207 of this title shall not apply with resect to ---

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximm hours of service pursuant to the provision of section 304 of Title 49: or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act [49 U.S.C.A. §181 et seq.]; or

(4) Repealed. Pub.L. 93-259, § 11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegatable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or

or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(7) Repealed. Pub.L. 93-259, § 21(b)(3), Apr. 8, 1974,88 Stat.68.

(8) Repealed. Pub.L. 95-151, § 14 (b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee of a street, suburban or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in section 203(s) (2) of this title; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establisment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which

are used exclusively for supply and storing of water for agricultural purposes; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no

more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18) Repealed. Pub.L. 93-259, § 15(c), Apr. 8, 1974, 88 Stat. 65.

(19) Repealed. Pub.L. 93-259, § 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95-151, § 5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93-259, § 10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational insti-

tution to serve as the parents of children ---

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institiution, if such employee and his spouse reside in such facilitites, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25) Repealed. Pub.L. 95-151, § 6(a), Nov. 1, 1977, 91 Stat. 1249.

(26) Repealed. Pub.L. 95-151, § 7(a), Nov. 1, 1977, 91 Stat. 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or selling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight; or

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one

and one-half times the regular rate at which he is employed.

(c)(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee ---

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the con-

sent of hs parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of tnis title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) the provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that--

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) The employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that--

(i) the individuals employed under such waiver be employed outside of school hours for the school dis-

trict where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection

(d) The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens

(including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a) (3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factor set forth in section 206(a) (3) of this title, that economic conditions warrant such action.

(f) The provisions of sections 206, 207, 211, and 212 of this title shall not apply

with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462)[43 U.S.C.A. § 1331 et seq.]; American-Samoa; Guam; Wake Island; Eniwetok Attol; Kwajalein Atoll; and Johnston Island.

(g) The exemption from section 206 of this title provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the

activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 206 of this title provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) of this section if it were in an enterprise described in section 203(s) of this title.

(h) The provisions of section 207 of this title shall not apply for a period or periods

of not more than fourteen workweeks in the aggregate in any calendar year to any employee who ---

(1) is employed by such employer ---

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the

receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for ---

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who ---

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks ---

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who ---

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks ---

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposed in any other fifty-two week period.

(As amended Sept. 23, 1966, Pub.L. 89-601, Title II, §§ 201 to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833, 834, 836 to 838; Oct. 15, 1966, Pub.L. 89-670, § 8(e), 80 Stat. 943; June 23, 1972, Pub.L. 92-318, Title IX, § 906(b)(1), 86 Stat.375; Apr. 8,1974, Pub.L. 93-259, §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (c), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub.L. 95 to 151, §§ 4 to 8, 9(d), 11, 14(a), (b), 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, Pub.L. 96-70, Title I, § 1225(a), 93 Stat. 468.)

**§ 214. Learners, apprentices, students, and handicapped workers**

**(a) Learners, apprentices, messengers**

The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 206 of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

**(b) Students**

(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subpara-

graph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 of this title or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 205(e) of this title, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206(c) of this title), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed--

(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this chapter before the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards

Amendments of 1974 for the employment of students by such employer, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974--

(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

(II) the proportion of student hours of employment to the total hours of

employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establishment is not a metropolitan area, or (III) other establishments of the same general character operating in the

community or the nearest comparable community.

For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term "student hours of employment" means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 206(a)(5) of this title or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 205(e) of this title, at a wage rate not less than 85 per centum of the wage rate in effect under section 206(c) of this title), of full-time students

(regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunites for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 of this title or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 205(e) of this title, at a wage rate not less than 85 per centum of the wage rate in effect under section 206(c) of this title), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and

requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed six, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing

the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed six--

(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall

not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher edcuation; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirement of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the

student status of the employees to be employed under such special certificate.

(D) To minimize paperwork for, and to encourage, small businesses to employ students under special certificates issued under paragraphs (1) and (2), the Secretary shall, by regulation or order, prescribe a simplified application form to be used by employers in applying for such a certificate for the employment of not more than six full-time students. Such an application shall require only--

(i) a listing of the name, address,and business of the applicant employer,

(ii) a listing of the date the applicant began business, and

(iii) the certification that the employment of such full-time students will not reduce the full-time employment opportunities of persons other than persons employed under special certificates.

**(c) Handicapped workers**

(1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are--

(A) lower than the minimum wage applicable under section 206 of this title,

(B) commensurate with those paid to non-handicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

(2) The Secretary shall not issue a certificate under paragraph (1) unless the

employer provides written assurances to the Secretary that--

(A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and

(B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals employed in the locality for essentially the same type of work.

(3) Notwithstanding paragraph (1), no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection in effect on June 1, 1986, of any handicapped individual for a period of two years from such date without prior authorization of the Secretary.

(4) Nothing in this subsection shall be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients.

(5)(A) Notwithstanding any other provision of this subsection, any employee receiving a special minimum wage at a rate specified pursuant to this subsection or the parent or guardian of such an employee may petition the Secretary to obtain a review of such special minimum wage rate. An employee or the employee's parent or guardian may file such a petition for and in behalf of the employee or in behalf of the employee and other employees similarly situated. No employee may be a party to any such action unless the employee or the employee's parent or guardian give consent in writing to become such a party and such consent is filed with the Secretary.

(B) Upon receipt of a petition filed in accordance with subparagraph (A), the Secre-

tary within ten days shall assign the petition to an administrative law judge appointed pursuant to section 3105 of Title 5. The administrative law judge shall conduct a hearing on the record in accordance with section 554 of Title 5 with respect to such petition within thirty days after assignment.

(C) In any such proceeding, the employer shall have the burden of demonstrating that the special minimum wage rate is justified as necessary in order to prevent curtailment of opportunities for employment.

(D) In determining whether any special minimum wage rate is justified pursuant to subparagraph (C), the administrative law judge shall consider--

(i) the productivity of the employee identified in the petition and the conditions under which such productivity was measured; and

(ii) the productivity of other employees performing work of essentially the same type and quality for other employers in the same vicinity.

(E) the administrative law judge shall issue a decision within thirty days after the hearing provided for in subparagraph (B). Such action shall be deemed to be a final agency action unless within thirty days the Secretary grants a request to review the decision of the administrative law judge. Either the petitioner or the employer may request review by the Secretary within fifteen days of the date of issuance of the decision by the administrative law judge.

(F) The Secretary, within thirty days after receiving a request for review, shall review the record and either adopt the decision of the administrative law judge or issue exceptions. The decision of the administrative law judge, together with any exceptions, shall be deemed to be a final agency action.

(G) A final agency action shall be subject to judicial review pursuant to chapter 7 of Title 5. An action seeking such review shall be brought within thirty days of a final ageny action described in subparagraph (F).

**(d) Employment by schools**

The Secretary may by regulation or order provide that sections 206 and 207 of this title shall not apply with respect to the employment by any elementary of secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws.

(As amended Sept. 23, 1966, Pub.L. 89-601, Title V, § 501, 80 Stat. 842; Apr. 9, 1974, Pub.L. 93-259, § 24(a), (b), 88 Stat. 69, 72; Nov. 1, 1977, Pub.L. 95-151, §§ 12, 13, 91 Stat. 1252; Oct. 16, 1986, Pub.L. 99-486, 100 Stat. 1229.)

**§ 215. Prohibited acts; prima facie evidence**

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

(1) to transport, offer for tranportation, shop, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or deliver or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any

goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any compliant or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in

any such proceeding, or has been served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title, or any regulation or order made or continued in effect under the provisions of section 211(d) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purpose of subsection (a)(1) of this section proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the produc-

tion of such goods. June 25, 1938, c. 676, § 15, 52 Stat. 1068; Oct. 1949, c. 736, § 13, 63 Stat. 919.

**§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision**

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid over-

time compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in

which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon

the filing of a complaint by the Secretary in an action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under section 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In deter

mining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake

Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a) (3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be--

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent

jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and

collecting such penalties, in accordance with the provisions of section 9a of this title. (As amended Sept. 23, 1966, Pub.L. 89-601, Title VI, § 601(a), 80 Stat. 844; Apr. 8, 1974, Pub.L. 93-259, §§6(d)(1), 25(c), 26, 88 Stat. 61, 72, 73; Nov. 1, 1977, Pub.L. 95-151, § 10,91 Stat. 1252.)

**§ 217. Injuction proceedings**

The district courts, together with the United states District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of commencement of the action to res-

train the violations, by virtue of the provisions of section 255 of this title). (June 25, 1938, c. 676, § 17, 52 Stat. 1069; Oct. 26, 1949, c. 736, § 15, 63 Stat 919; Aug. 30, 1957, Pub.L. 85-231, § 1(3), 71 Stat. 514; July 12, 1960, Pub.L. 86-624, § 21(c), 74 Stat. 417; May 5, 1961, Pub.L. 87-30, § 12(b), 75 Stat. 74.)

**§ 218. Relation to other laws**

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordianance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of

this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law--

(1) any Federal employee in the Canal Zone engaged in employement of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces,

shall have his basis compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b)

of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

(June 25, 1938, c. 676, § 18, 52 Stat. 1069; Sept. 23, 1966, Pub.L. 89-601, Title III, § 306, 80 Stat. 841; Sept. 11, 1967, Pub.L. 90-83, § 8, 81 Stat. 222.)

**§ 219. Separability of provisions**

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(June 25, 1938, c. 676, § 19, 52 Stat. 1069.)

# APPENDIX E

## Legal Services Corporation Act, 42 U.S.C. sec. 2996 et seq

## SUBCHAPTER X-LEGAL SERVICES CORPORATION

**§ 2996. Congressional findings and declaration of purpose.**

The Congress finds and declares that--

(1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;

(2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;

(3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;

(4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;

(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

**§ 2996a. Definitions**

As used in this subchapter, the term--

(1) "Board" means the Board of Directors of the Legal Services Corporation;

(2) "Corporation" means the Legal Services Corporation established under this subchapter;

(3) "eligible client" means any person financially unable to afford legal assistance;

(4) "Governor" means the chief executive officer of a State;

(5) "legal assistance" means the provision of any legal services consistent with the purposes and provisions of this subchapter;

(6) "recipient" means any grantee, contractee, or recipient of financial assistance described in clause (A) of section 2996e(a)(1) of this title;

(7) "staff attorney" means an attorney who receives more than one-half of his annual professional income from a recipient organized solely for the provision of legal assistance to eligible clients under this subchapter; and

(8) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(Pub.L. 88-452, Title X, § 1002, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 378.)

**§ 2996b. Legal Services Corporation**

**(a) Establishment; purpose**

There is established in the District of Columbia a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.

**(b) Principal office; agent for service of process**

The Corporation shall maintain its principal office in the District of Columbia and shall maintain therein a designated agent to accept service of process for the Corporation. Notice to or service upon the agent shall be deemed notice to or service upon the Corporation.

**(c) Status of corporation under tax law**

The Corporation, and any legal assistance program assisted by the Corporation, shall be eligible to be treated as an organization described in section 170(c)(2)(B) of Title 26 and as an organization described in section 501(c)(3) of Title 26 which is exempt from taxation under section 501(a) of Title 26. If such treatments are conferred in accordance with the provisions of Title 26, the Corporation, and legal assistance programs assisted by the Corporation, shall be subject to all provisions of Title 26 relevant to the conduct of organizations exempt from taxation.

(Pub.L. 88-452, Title X, § 1003, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 379.)

**§ 2996c. Board of Directors**

**(a) Establishment; membership**

The Corporation shall have a Board of Directors consisting of eleven voting members

appointed by the President, by and with the advice and consent of the Senate, no more than six of whom shall be of the same political party. A majority shall be members of the bar of the highest court of any State, and none shall be a full-time employee of the United States. Effective with respect to appointments made after December 28, 1977 but not later than July 31, 1978, the membership of the Board shall be appointed so as to include eligible clients, and to be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.

**(b) Term of office**

The term of office of each member of the Board shall be three years, except that five of the members first appointed, as designated by the President at the time of appointment, shall serve for a term of two years. Each member of the Board shall continue to serve until the successor to such member has been

appointed and qualified. The term of initial members shall be computed from the date of the first meeting of the Board. The term of each member other than initial members shall be computed from the date of termination of the preceding term. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which such member's predecessor was appointed shall be appointed for the remainder of such term. No member shall be reappointed to more than two consecutive terms immediately following such member's initial term.

**(c) Board members not deemed officers or employees of United States**

The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States.

**(d) Chairman**

The President shall select from among the voting members of the Board a chairman, who shall serve for a term of three years.

Thereafter the Board shall annually elect a chairman from among its voting members.

**(e) Removal**

A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause.

**(f) State advisory councils**

Within six months after the first meeting of the Board, the Board shall request the Governor of each State to appoint a nine-member advisory council for such State. A majority of the members of the advisory council shall be appointed, after recommendations have been received from the State Bar association, from among the attorneys admitted to practice in the State, and the membership of the council shall be subject to annual reappointment. If ninety days have elapsed without such an advisory council

appointed by the Governor, the Board is authorized to appoint such a council. The advisory council shall be charged with notifying the Corporation of any apparent violation of the provisions of this subchapter, and applicable rules, regulations, and guidelines promulgated pursuant to this subchapter. The advisory council shall, at the same time, furnish a copy of the notification to any recipient affected thereby, and the Corporation shall allow such recipient a reasonable time (but in no case less than thirty days) to reply to any allegation contained in the notification.

**(g) Open meetings; applicability of Government in the Sunshine provisions**

All meetings of the Board, of any executive committee of the Board, and of any advisory council established in connection with this subchapter shall be open and shall be subject to the requirements and provisions of section 552b of Title 5 (relating to open meetings).

**(h) Quarterly meetings**

The Board shall meet at least for times during each calendar year.

(Pub.L. 88-452, Title X, § 1004, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 379, and amended Pub.L. 95-222, §§ 3, 4, Dec. 28, 1977, 91 Stat. 1619.)

**§ 2996d. Officers and employees**

**(a) Appointment of president; outside compensation of officers prohibited; terms**

The Board shall appoint the president of the Corporation, who shall be a member of the bar of the highest court of a State and shall be a non-voting ex officio member of the Board, and such other officers as the Board determines to be necessary. No officer of the Corporation may receive any salary or other compensation for services from any source other than the Corporation during his period of employment by the Corporation, except as authorized by the Board. All officers shall serve at the pleasure of the Board.

**(b) Power of president to appoint and remove employees; nonpartisan appointments**

(1) The president of the Corporation, subject to general policies established by the Board, may appoint and remove such employees of the Corporation as he determines necessary to carry out the purposes of the Corporation.

(2) No political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the Corporation or of any recipient, or in selecting or monitoring any grantee, contractor, or person or entity receiving financial assistance under this subchapter.

**(c) Conflict of interest**

No member of the Board may participate in any decision, action, or recommendation with respect to any matter which directly benefits such member or pertains specifically to any

firm or organization with which such member is then associated or has been associated within a period of two years.

**(d) Compensation**

Officers and employees of the Corporation shall be compensated at rates determined by the Board, but not in excess of the rate of level V of the Executive Schedule specified in section 5316 of Title 5.

**(e) Officers and employees not deemed officers and employees of Federal Government; Corporation not deemed a department, agency, or instrumentality of Federal Government; review of annual budget**

Except as otherwise specifically provided in this subchapter, officers and employees of the Corporation shall not be considered officers or employees, and the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government.

(2) Nothing in this subchapter shall be construed as limiting the authority of the

Office of Management and Budget to review and submit comments upon the Corporation's annual budget request at the time it is transmitted to the Congress.

**(f) Exceptions**

Officers and employees of the Corporation shall be considered officers and employees of the Federal Government for purposes of the following provisions of Title 5: subchapter I of chapter 81 (relating to compensation for work injuries); chapter 83 (relating to civil service retirement); chapter 87 (relating to life insurance); and chapter 89 (relating to health insurance). The Corporation shall make contributions at the same rates applicable to agencies of the Federal Government under the provisions referred to in this subsection.

**(g) Freedom of information**

The Corporation and its officers and employees shall be subject to the provisions

of section 552 of Title 5 (relating to freedom of information).

(Pub.L. 88-452, Title X, § 1005, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 380.)

**§ 2996e. Powers, duties, and limitations**

**(a) Powers of nonprofit corporation; additional powers**

To the extent consistent with the provisions of this subchapter, the Corporation shall exercise the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act (except for section 1005(o) of title 29 of the District of Columbia Code). In addition, the Corporation is authorized--

(1)(A) to provide financial assistance to qualified programs furnishing legal assistance to eligible clients, and to make grants to and contracts with --

(i) individuals, partnerships, firms, corporations, and nonprofit organizations, and

(ii) State and local governments (only upon application by an appropriate State or local agency or institution and upon a special determination by the Board that the arrangements to be made by such agency or institution will provide services which will not be provided adequately through nongovernmental arrangements),

for the purpose of providing legal assistance to eligible clients under this subchapter, and (B) to make such other grants and contracts as are necessary to carry out the purposes and provisions of this subchapter;

(2) to accept in the name of the Corporation, and employ or dispose of in furtherance of the purposes of this subchapter, any money or property, real, personal, or mixed, tan-

gible or intangible, received by gift, devise, bequest, or otherwise; and

(3) to undertake directly, or by grant or contract, the following activities relating to the delivery of legal assistance--

(A) Research, except that broad general legal or policy research unrelated to representation of eligible clients may not be undertaken by grant or contract,

(B) training and technical assistance, and

(C) to serve as a clearinghouse for information.

**(b) Disciplinary powers; representational questions; interference with professional responsibilities of attorneys; bar membership; restrictions, language other than English**

(1)(A) The Corporation shall have authority to insure the compliance of recipients and their employees with the provisions of this subchapter and the rules, regulations,

and guidelines promulgated pursuant to this subchapter, and to terminate, after a hearing in accordance with section 2996j of this title, financial support to a recipient which fails to comply.

(B) No question of whether representation is authorized under this subchapter, or the rules, regulations or guidelines promulgated pursuant to this subchapter, shall be considered in, or affect the final disposition of, any proceeding in which a person is represented by a recipient or an employee of a a recipient. A litigant in such a proceeding may refer any such question to the Corporation which shall review and dispose of the question promptly, and take appropriate action. This subparagraph shall not preclude judicial review available under applicable law.

(2) If a recipient finds that any of its employees has violated or caused the recipient to violate the provisions of this sub-

chapter or the rules, regulations, and guidelines promulgated pursuant to this subchapter, the recipient shall take appropriate remedial or disciplinary action in accordance with the types of procedures prescribed in the provisions of section 2996j of this title.

(3) The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the Amercian Bar Association (referred to collectively in this subchapter as "professional responsibilities") or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter

are carried out in a manner consistent with attorneys' professional responsibilities.

(4) No attorney shall receive any compensation, either directly or indirectly, for the provision of legal asisstance under this subchapter unless such attorney is admitted or otherwise authorized by law, rule, or regulation to practice law or provide such assistance in the jurisdiction where such assistance is initiated.

(5) The Corporation shall insure that (A) no employee of the Corporation or of any recipient (except as permitted by law in connection with such employee's own employment situation), while carrying out legal assistance activities under this subchapter, engage in, or encourage others to engage in, any public demonstration or picketing, boycott, or strike; and (B) no such employee shall, at any time, engage in, or encourage others to engage in, any of the following activities; (i) any rioting or civil disturbance, (ii)

any activity which is in violation of an outstanding injunction of any court of competent jurisdiction, (iii) any other illegal activity, or (iv) any intentional identification of the Corporation or any recipient with any political activity prohibited by section 2996(a)(6) of this title. The Board, within ninety days after its first meeting, shall issue rules and regulations to provide for the enforcement of this paragraph and section 2996f(a)(5) of this title, which rules shall include, among available remedies, provisions, in accordance with the types of procedures prescribed in the provisions of section 2996j of this title, for suspension of legal assistance supported under this subchapter, suspension of an employee of the Corporation or of any employee of any recipient by such recipient, and, after consideration of other remedial measures and after a hearing in accordance with section 2996j of this title, the termination of such assistance or employment, as deemed appropriate for the violation

in question.

(6) In areas where significant numbers of eligible clients speak a language other than English as their principal langauge, the Corporation shall, to the extent feasible, provide that their principal language is used in the provision of legal assistance to such clients under this subchapter.

**(c) Participation in litigation; lobbying activities**

The Corporation shall not itself--

(1) participate in litigation unless the Corporation or a recipient of the Corporation is a party, or a recipient is representing an eligible client in litigation in which the interpretation of this subchapter or a regulation promulgated under this subchapter is an issue, and shall not participate on behalf of any client other than itself; or

(2) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local

legislative bodies, except that personnel of the Corporation may testify or make other appropriate communication (A) when formally requested to do so by a legislative body, a committee, or a member thereof, or (B) in connection with legislation or appropriations directly affecting the activities of the Corporation.

**(d) Miscellaneous prohibitions**

(1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, or employee, except as reasonable compensation for services or reimbursement for expenses.

(3) Neither the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or equipment to any political party or association,

or the campaign of any candidate for public or party office.

(4) Neitner the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or eqipment for use in advocating or opposing any ballot measures, initiatives, or referendums. However, an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights.

(5) No class action suit, class action appeal, or amicus curiae class action may be undertaken, directly or through others, by a staff attorney, except with the express approval of a project director of a recipient in accordance with policies established by the governing body of such recipient.

(6) Attorneys employed by a recipient shall be appointed to provide legal assistance without reasonable compensation only when such appointment is made pursuant to a

statute, rule, or practice applied generally to attorneys practicing in the court where the appointment is made.

**(e) Political activities of Corporation employees and staff attorneys**

(1) Employees of the Corporation or of recipients shall not at any time intentionally identify the Corporation or the recipient with any partisan or nonpartisan politicial activity associated with a political party or association, or the campaign of any candidate for public or party office.

(2) Employees of the Corporation and staff attorneys shall be deemed to be State or local employees for purposes of chapter 15 of Title 5, except that no staff attorney maybe a candidate in a partisan political election.

**(f) Harassment; malicious abuse of legal process**

If an action is commenced by the Corporation or by a recipient and a final order is

entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court shall, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order (which shall be appealable before being made final) awarding reasonable costs and legal fees incurred by the defendant in defense of the action, except when in contravention of a State law, a rule of court, or a statute of general applicability. Any such costs and fees shall be directly paid by the Corporation.

(Pub.L. 88-452, Title X, § 1006, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 381, and amended Pub.L. 95-222, §§ 5(a), (b), 6, 7(a), 8, Dec. 28, 1977, 91 Stat. 1619, 1620.)

**§ 2996f. Grants and contracts**

**(a) Requisites**

With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall--

(1) insure the maintenance of the highest quaility of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients;

(2)(A) establish, in consultation with the Director of the Office of Management and Budget and with the Governors of the several States, maximum income levels (taking into account family size, urban and rural differences, and substantial cost-of-living variations) for individuals eligible for legal assistance under this subchapter;

(B) establish quidelines to insure that eligibility of clients will be determined by

recipients on the basis of factors which include--

(i) the liquid assets and income level of the client,

(ii) the fixed debts, medical expenses, and other factors with affect the client's ability to pay,

(iii) the cost of living in the locality, and

(iv) such other factors as relate to financial inability to afford legal assistance, which may include evidence of a prior determination that such individual's lack of income results from refusal or unwillingness, without good cause, to seek or accept an employment situation; and

(C) insure that (i) recipients, consistent with goals established by the Corporation, adopt procedures for determining and implementing priorties for the provision of such assistance, taking into account the relative

needs of eligible clients for such assistance (including such outreach, training, and support services as may be necessary), including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including elderly and handicapped individuals); and (ii) appropriate training and support service are provided in order to provide such assistance to such significant segments of the population of eligible clients;

(3) insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas;

(4) insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated ouside practice of law, and (B) any uncompensated outside prac-

tice of law except as authorized in guidelines promulgated by the Corporation;

(5) insure that no funds made available to recipients by the Corporation shall be used at any time, directly or indirectly, to influence the issuance, amendment or revocation of any executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition, except where--

(A) representation by an employee of a recipient for any eligible client if necessary to the provision of legal advice and representation with resepct to such client's legal rights and responsibilities (which shall not be construed to permit an attorney or a recipient employee to solicit a client, in violation of professional responsibili-

ties, for the purpose of making such representation possible); or

(B) a governmental agency, legislative body, a committee, or a member thereof--

(i) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or

(ii) is considering a measure directly affecting the activities under this subchapter of the recipient or the Corporation.

(6) insure that all attorneys engaged in legal assistance activities supported in whole or in part by the Corporation refrain, while so engaged, from--

(A) any political activity, or

(B) any activity to provide voters or prospective voters with transportation to the polls or provide similar assistance in connection with an election (other than legal advice and representation), or

(C) any voter registration activity (other than legal advice and representation);

(7) require recipients to establish guidelines, consistent with regulations promulgated by the Corporation, for a system for review of appeals to insure the efficient utilization of resources and to avoid frivolous appeals (except that such guideliness or regulations shall in no way interfere with attorneys' professional responsibilities);

(8) insure that recipients solicit the recommendations of the organized bar in the community being served before filling staff attorney positions in any project funded pursuant to this subchapter and give preference in filing such positions to qualified persons who reside in the community to be served;

(9) insure that every grantee, contractor, or person or entity receiving financial assistance under this subchapter or predecessor authority under this chapter which files with the Corporation a timely application for

refunding is provided interim funding necessary to maintain its current level of activities until (A) the application for refunding has been approved and funds pursuant thereto received, or (B) the application for refunding has been finally denied in accordance with section 2996j of this title; and

(10) insure that all attorneys, while engaged in legal assistance activities supported in whole or in part by the Corporation, refrain from the persistent incitement of litigation and any other activity prohibited by the Canons of Ethics and Code of Professional Responsibility of the American Bar Association, and insure that such attorneys refrain from personal representation for a private fee in any cases in which they were involved while engaged in such legal assistance activities.

**(b) Limitations on uses**

No funds made available by the Corporation under this subchapter, either by grant or contract, may be used--

(1) to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available);

(2) to provide legal assistance with respect to any criminal proceeding, except to provide assistance to a person charged with a misdemeanor or lesser offense or its equivalent in an Indian tribal court;

(3) to provide legal assistance in civil actions to persons who have been convicted of a criminal charge where the civil action arises out of alleged acts or failures to act and the action is brought against an officer of the court or against a law enforcement

official for the purpose of challenging the validity of the criminal convictions;

(4) for any of the political activities prohibited in paragraph (6) of subsection (a) of this section;

(5) to make grants to or enter into contracts with any private law firm which expends 50 percent or more of its resources and time litigating issues in the broad interests of a majority of the public;

(6) to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activiites, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations, as distinguished from the dissemination of information about such policies or acticities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients;

(7) to initiate the formation, or act as an organizer, of any association, federation, or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients;

(8) to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution;

(9) to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system, except that nothing in this paragraph shall prohibit the provision of legal advice to an eligible

client with respect to such client's legal rights and responsibilities; or

(10) to provide legal assistance with respect to any proceeding or litigation arising out of a violation of the Military Selective Service Act [50 App. U.S.C.A. § 451 et seq.] or of desertion from the Armed Forces of the United States, except that legal assistance may be provided to an eligible client in a civil action in which such client alleges that he was improperly classified prior to July 1, 1973, under the Military Selective Service Act or prior corresponding law.

**(c) Recipient organizations**

In making grants or entering into contracts for legal assistance, the Corporation shall insure that any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body at least 60 percent of which consists of attorneys who are members of the bar of a State in which the legal assistance is to be

provided (except that the Corporation (1) shall, upon application, grant waivers to permit a legal services program, supported under section 2809(a)(3) of this title, which on July 25, 1974, has a majority of persons who are not attorneys on its policy-making board to continue such a non-attorney majority under the provisions of this subchapter, and (2) may grant, pursuant to regulations issued by the Corporation, such a waiver for recipients which, because of the nature of the population they serve, are unable to comply with such requirement) and at least one-third of which consists of persons who are, when selected, eligible clients who may also be representatives of associations or organizations of eligible clients. Any such attorney, while serving on such board, shall not receive compensation from a recipient.

**(d) Program evaluation**

The Corporation shall monitor and evaluate and provide for independent evaluations of programs supported in whole or in part under this subchapter to insure that the provisions of this subchapter and the bylaws of the Corporation and applicable rules, regulations, and guidelines promulgated pursuant to this subchapter are carried out.

**(e) Corporation president authorized to make grants and enter into contracts**

The president of the Corporation is authorized to make grants and enter into contracts under this subchapter.

**(f) Public notification**

At least thirty days prior to approval of any grant application or prior to entering into a contract or prior to the initiation of any other project, the Corporation shall announce publicly, and shall notify the Governor, the State bar association of any State, and the principal local bar associations (if there be any) of any community,

where legal assistance will thereby be initiated, of such grant, contract, or project. Notification shall include a reasonable description of the grant application or proposed contract or project and request comments and recommendations.

**(g) Staff-attorney program study**

The Corporation shall provide for comprehensive, independent study of the existing staff-attorney program under this chapter and, through the use of appropriate demonstration projects, of alternative and supplemental methods of delivery of legal services to eligible clients, including judicare, vouchers, prepaid legal insurance, and contracts with law firms; and, based upon the results of such study, shall make recommendations to the President and the Congress, not later than two years after the first meeting of the Board, concerning improvements, changes, or alternative methods for the

economical and effective delivery of such services.

**(h) Study and report to Congress on special needs of eligible clients**

The Corporation shall conduct a study of whether eligible clients who are--

(1) veterans,

(2) native Americans,

(3) migrants or seasonal farm workers,

(4) persons with limited English-speaking abilities, and

(5) persons in sparsely populated areas where a harsh climate and an inadequate transportation system are significant impediments to receipt of legal services

have special difficulties of access to legal services or special legal problems which are not being met. The Corporation shall report to Congress not later than January 1, 1979, on the extent and nature of any such problems and difficulties and shall include in the

report and implement appropriate recommendations.

(Pub.L. 88-452, Title X, § 1007, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 383, and amended Pub.L. 95-222, §§ 7(b), 9(a), (b)(1), (c), 10, 11, 12, 13, Dec. 28, 1977, 91 Stat. 1620-1623.)

**§ 2996g. Records and reports**

**(a) Authority to require reports**

The Corporation is authorized to require such reports as it deems necessary from any grantee, contractor, or person or entity receiving financial assistance under this subchapter regarding activities carried out pursuant to this subchapter.

**(b) Authority to require recordkeeping; access to records**

The Corporation is authorized to prescribe the keeping of records with respect to funds provided by grant or contract and shall have access to such records at all reasonable times for the purpose of insuring compliance

with the grant or contract or the terms and conditions upon which financial assistance was provided.

**(c) Annual report to President and Congress; contents**

The Corporation shall publish an annual report which shall be filed by the Corporation with the President and the Congress. Such report shall include a description of services provided pursuant to section 2996f(a)(2)(C)(i) and (ii) of this title.

**(d) Copies and retention of reports**

Copies of all reports pertinent to the evaluation, inspection, or monitoring of any grantee, contractor, or person or entity receiving financial assistance under this subchapter shall be submitted on a timely basis to such grantee, contractor, or person or entity, and shall be maintained in the principal office of the Corporation for a period of at least five years subsequent to such evaluation, inspection, or monitoring.

Such reports shall be available for public inspection during regular business hours, and copies shall be furnished, upon request, to interested parties upon payment of such reasonable fees as to Corporation may establish.

**(e) Publication in Federal Register of rules, regulations, guidelines and instructions**

The Corporation shall afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guideliness, and it shall publish in the Federal Register at least 30 days prior to their effective date all its rules, regulations, guidelines, and instructions.

(Pub.L. 88-462, Title X, § 1008, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 386, as amended Pub.L. 95-222, § 9(b)(2), Dec. 28, 1977, 91 Stat. 1621.)

**§ 2996h. Audits**

**(a) Annual audit; availability of records; filing and inspection of report**

(1) The accounts of the Corporation shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants who are certified by a regulatory authority of the jurisdiction in which the audit is undertaken.

(2) The audits shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Corporation and necessary to facilitate the audits shall be made available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to any such person.

(3) The report of the annual audit shall be filed with the General Accounting Office and shall be available for public inspection during business hours at the principal office of the Corporation.

**(b) Audit by General Accounting Office**

(1) In addition to the annual audit, the financial transactions of the Corporation for any fiscal year during which Federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with such rules and regulations as may be prescribed by the Comptroller General of United States.

(2) Any such audit shall be conducted at the place or places where accounts of the Corporation are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Corporation and necessary to facilitate

the audit; and full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to such representatives. All such books, accounts, financial records, reports, files, and other papers or property of the Corporation shall remain in the possession and custody of the Corporation throughout the period beginning on the date such possession or custody commences and ending three years after such date, but the General Accounting Office may require the retention of such books, accounts, financial records, reports, files, papers, or property for a longer period under section 67(b) of Title 31.

(3) A report of such audit shall be made by the Comptroller General to the Congress and to the President, together with such recommendations with respect thereto as he shall deem advisable.

**(c) Annual financial audit of recipient persons or bodies**

(1) The Corporation shall conduct, or require each grantee, contractor, or person or entity receiving financial assistance under this subchapter to provide for, an annual financial audit. The report of each such audit shall be maintained for a period of at least five years at the principal office of the Corporation.

(2) The Corporation shall submit to the Comptroller General of the United States copies of such reports, and the Comptroller General may, in addition, inspect the books, accounts, financial records, files, and other papers or property belonging to or in use by such grantee, contractor, or person or entity, which relate to the disposition or use of funds received from the Corporation. Such audit reports shall be available for public inspection, during regular business

hours, at the principal office of the Corporation.

**(d) Attorney-client privilege**

Notwithstanding the provisions of this or section 2996g of this title, neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege.

(Pub.L. 88-452, Title X, § 1009, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 387, and amended Pub.L. 95-222, § 14, Dec. 28, 1977, 91 Stat. 1623)

**§ 2996i. Financing**

**(a) Authorization of appropriations**

There are authorized to be appropriated for the purpose of carrying out the activities of the Corporation, $90,000,000 for fiscal year 1975, $100,000,000 for fiscal year 1976, and such sums as may be necessary for fiscal year 1977. There are authorized to be appropriated for the purpose of carrying out the activities of the Corporation

$205,000,000 for the fiscal year 1978, and such sums as may be necessary for each of the two suceeding fiscal years. The first appropriation may be made available to the Corporation at any time after six or more members of the Board have been appointed and qualified. Appropriations for that purpose shall be made for not more than two fiscal years, and shall be paid to the Corporation in in annual installments at the beginning of each fiscal year in such amounts as may be specified in Acts of Congress making appropriations.

**(b) Availability of funds**

Funds appropriated pursuant to this section shall remain available until expended.

**(c) Non-Federal funds**

Non-Federal funds received by the Corporation, and funds received by any recipient from a source other than the Corporation, shall be accounted for and reported as receipts and disbursements separate and dis-

tinct from Federal funds; but any funds so received for the provision of legal assistance shall not be expended by recipients for any purpose prohibited by this subchapter, except that this provision shall not be construed to prevent recipients from receiving other public funds or tribal funds (including foundation funds benefiting Indians or Indian tribes) and expending them in accordance with the purposes for which they are provided, or to prevent contracting or making other arrangements with private attorneys, private law firms, or other State or local entities of attorneys, or with legal aid societies having separate public defender programs, for the provision of legal assistance to eligible clients under this subchapter.

**(d) Limitiations on grant or contract authority**

Not more than 10 percent of the amounts appropriated pursuant to subsection (a) of this section for any fiscal year shall be

available for grants or contracts under section 2996e(a)(3) of this title in any such year.

(Pub.L. 88-452, Title X, § 1010, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 388, and amended Pub.L. 95-222, §§ 5(c), 15, Dec. 28, 1977, 91 Stat. 1619, 1623.)

**§ 2996j. Special limitations**

The corporation shall prescribe procedures to insure that--

(1) financial assistance under this subchapter shall not be suspended unless the grantee, contractor, or person or entity receiving financial assistance under this subchapter has been given reasonable notice and opportunity to show cause why such action should not be taken; and

(2) financial assistance under this subchapter shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days,

unless the grantee, contractor, or person or entity receiving financial assistance under this subchapter has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner. Such hearing shall be held prior to any final decision by the Corporation to terminate financial assistance or suspend or deny funding. Hearing examiners shall be appointed by the Corporation in accordance with procedures established in regulations promulgated by the Corporation. (Pub.L. 88-452, Title X, § 1011, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 388, and amended Pub.L. 95-222, § 16, Dec. 28, 1977, 91 Stat. 1624.)

**§ 2996k. Coordination**

The President may direct that appropriate support functions of the Federal Government may be made available to the Corporation in carrying out its activities under this sub-

chapter, to the extent not inconsistent with other applicable law.

(Pub.L. 88-452, Title X, § 1012, as added Pub.L. 93-355, § 2, July 25, 1974, 88 Stat. 388.)

Legislative History. For legislative history and purpose of Pub.L. 96-355, see 1974 U.S.Code Cong. and Adm. News, p. 3872.

## EXECUTIVE ORDER NO. 11874

July 25, 1975, 40 F.R. 31737

## DELEGATION OF FUNCTIONS TO DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET

By virtue of the authority vested in me by Section 1012 of the Economic Opportunity Act of 1974 (88 Stat. 388, 42 U.S.C. 2996k) [this section], and Section 301 of Title 3 of the United States Code [Section 301 of Title 3, The President] and as President of the United States, the Director of the Office of Management and Budget is hereby designated and empowered to exercise the authority vested in the President by said Section 1012 of he

Economic Opportunity Act of 1964, as amended [this section] to direct that appropriate support functions of the Federal Government may be made available to the Legal Services Corporation in carrying out its activities to the extent not inconsisent with other applicable law. Such functions shall be provided under terms and conditions as may be agreed upon by the Legal Services Corporation and the Federal agencies involved.

Gerald R. Ford

**§ 29961. Reservation of right to repeal, alter, or amend**

The right to repeal, alter, or amend this subchapter at any time is expressly reserved.

(Pub.L. 88-452, Title X, § 1013, as added Pub.L. 92-355, § 2, July 25, 1974, 88 Stat. 388.)

APPENDIX F
Plaintiffs' Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| MARGARITO REYES, ENRIQUE ALANIS, JESUS ALANIZ GONZALEZ, RAFAEL CARDENAS, SR., RAFAEL CARDENAS, JR., SANTOS CARRIZALES, BERNARDO CERVANTES, ENRIQUE DIAZ, ESTEBAN HERNANDEZ, JUAN HERNANDEZ, JUAN JOSE NUNEZ, ANDRES OLIVARES, JUAN GUEL PALACIOS, ABRAHAM RIVERA, JOSE SOLIS, FRUMENCIO TORRES TRIGO, HEBERTO VALDEZ, ALFONSO VARGAS, PEDRO VARGAS, ABRAHAM BARBOSA, SR., CRISTINA BARBOSA, PEDRO ZAVALA, JUAN LOPEZ, MARIA DEL SOCORRO ZAVALA, MARCOS ZAVALA, ANGELIA SANTIAGO ZAVALA, BELINDA ZAVALA, PEDRO ZAVALA, JR., JOSE ZAVALA, and MARIA DIANA ZAVALA, Plaintiffs | § | CIVIL ACTION NO. B-85-412 |
| vs. | § | COMPLAINT |
| GRIFFIN & BRAND OF MCALLEN, INC., DANIEL TORRES, ALFREDO CANTU BENITO BAZAN, and GUADALUPE SALDIVAR, Defendants | § | |

## INTRODUCTION

1. Plaintiffs are migrant farm workers who harvested bell peppers for Defendants during September and October, 1984. Relying on offers of employment from Defendants, Plaintiffs travelled great distances and incurred substantial expense only to find that the work promised by Defendants was not available or that the terms and conditions of work violated their rights under various federal statutes and resulted in a breach of contract. This action is brought by Plaintiffs to obtain damages and declaratory relief for the injuries they have suffered from Defendants' violations of the Migrant and Seasonal Agricultural Workers Protection Act (hereafter "AWPA"), 29 U.S.C. §§1801 et seq., and the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. §§ 201 et seq., and for Defendants' breach of contract.

## JURISDICTION

2. This Court has jurisdiction of this action pursuant to 29 U.S.C. §1854(a) (AWPA) and 29 U.S.C. §216(b) (FLSA), 28 U.S.C. §§1331, and 1337, and 28 U.S.C. §§2201 and 2202. The Court may exercise pendent jurisdiction over Plaintiffs' state law claims for breach of the employment contract.

## PARTIES

3. Margarito Reyes, Enrigue Alanis, Jesus Alaniz Gonzalez, Rafael Cardenas, Sr., Rafael Cardenas, Jr., Santos Carrizales, Bernardo Cervantes, Enrique Diaz, Esteban Hernandez, Juan Hernandez, Juan Jose Nunez, Andres Olivares, Juan Guel Palacios, Abraham Rivera, Jose Solis, Frumencio Torres Trigo, Heberto Valdez, Alfonso Vargas, Pedro Vargas, Abraham Barbosa, Sr., Cristina Barbosa, Pedro Zavala, Juan Lopez, Maria Del Socorro Zavala, Marcos Zavala, Angelia Santiago Zavala, Belinda Zavala, Pedro Zavala, Jr., Jose Zavala, and Maria Diana Zavala (hereinafter "Plaintiffs")

are migrant farm workers who reside in Texas.

4. Defendant Griffin & Brand of McAllen, Inc. (hereinafter "G&B") is a Texas Corporation engaged in the business of producing and shipping agricultural products for movement in interstate commerce. Defendant G&B's registered agent for service of process is H.H. Rankin, Jr., 804 Pecan, McAllen, Texas 78501.

5. Defendant Daniel Torres' (hereinafter "Torres") permanent residence is in Hidalgo County, Texas. He can be served at the following address: 2412 Lindburg, McAllen, Texas, 78501.

6. Defendant Alfredo Cantu's (hereinafter "Cantu") permanent residence is in Hidalgo County, Texas. He can be served at the following address: Route 6, Box 22-578, Mission, Texas, 78572.

7. Defendant Benito Bazan's (hereinafter "Bazan") permanent residence is in Hidalgo

County, Texas. He can be served at the following address: 2612 Quince, McAllen, Texas, 78501.

8. Defendant Guadalupe Saldivar's (hereinafter "Saldivar") permanent residence is in Pecos, Texas. He can be served at the following address: 310 S. Mesquite, Pecos, Texas, 79772.

FACTS

9. Plaintiffs are migrant farm workers.

10. During 1984, Plaintiffs were entitled to protection under the AWPA and the FLSA.

11. Plaintiffs were employees of Defendants and were employed in an enterprise engaged in the production of goods for commerce.

12. At all times relevant herein Defendants were employers or joint employers of Plaintiffs, doing business in the State of Texas.

13. Defendants offered, and Plaintiffs accepted, employment performing agricultural labor in Pecos, Texas for Defendants.

14. Plaintiffs subsequently performed all conditions and obligations pursuant to the agreement for services in that Plaintiffs arrived ready, willing, and able to perform their employment contract with Defendants.

15. Defendants did not abide by the terms and conditions of employment and period of employment promised to Plaintiffs.

16. During all times relevant to this lawsuit, Defendant G&B used the services of Defendants Torres, Cantu, Bazan, and Saldivar to recruit, solicit, hire and furnish Plaintiffs, and other migrant and seasonal agricultural workers, to harvest its crops.

17. Plaintiffs were recruited, solicited or hired for employment with Defendants or their employees to perform agricultural employment in Pecos, Texas for Defendants.

18. At no time during Plaintiffs' recruitment did Defendants provide Plaintiffs with written disclosures in Spanish of the type and in the manner required by the AWPA

nor did they post a notice of the terms and conditions of housing.

19. Plaintiffs were required to purchase groceries at a particular store on credit from Defendant Torres.

20. Defendant Torres and Cantu, acting on behalf of themselves and Defendant G&B, provided housing to Plaintiffs at the Pecos Housing Authority.

21. Defendants misrepresented the terms and conditions of work to Plaintiffs prior to their arrival at the work site.

22. Defendants knowingly provided false and/or misleading information to Plaintiffs concerning the terms, conditions, and/or existence of agricultural employment.

23. Defendants failed to provide Plaintiffs with all the hours, terms, conditions of work, and period of employment promised to Plaintiffs.

24. Defendants failed, without justification, to abide by their work agreement with Plaintiffs.

25. Plaintiffs were given wage receipts which failed to include all the information Defendants are required to provide Plaintiffs under the AWPA.

26. Defendants have not made, kept, and preserved accurate and complete records as required by the AWPA.

27. Plaintiffs were paid on the piece rate basis which was not sufficiently high to allow Plaintiffs to earn at least the federal minimum wage in all pay periods.

28. Plaintiffs were not paid for all the hours worked.

29. By failing to pay Plaintiffs for all the hours worked, Defendants failed to pay wages owed when due and contributed to the failure of Plaintiffs' wages to average three and 35/100 dollars per hour ($3.35).

30. Defendants deducted money from Plaintiffs' salary before paying Plaintiffs, thus failing to pay Plaintiffs' wages owed to them when due.

FIRST CAUSE OF ACTION

31. At all times relevant herein, Defendant G&B was an agricultural employer as defined by AWPA, 29 U.S.C. §§1801 et seq.

32. At all times relevant herein, Defendants Torres, Cantu, Bazan, and Saldivar were farm labor contractors as definded by AWPA, 29 U.S.C. §§1801 et seq.

33. Defendants violated the provisions of the AWPA by inter alia;

a. failing to disclose information in the manner required by the AWPA;

c. failing to provide each worker with and itemized written statement of the terms, conditions, and/or existence of employment as required by the AWPA;

d. failing to post in a conspicuous place or present a statement of terms and

conditions, if any, of occupancy of such housing as required by the AWPA;

e. failing to make, keep and maintain records required to be made and kept under the AWPA;

g. knowingly providing false or misleading information to Plaintiffs concerning the terms, conditions, or existence of agricultural employment required to be disclosed as prohibited by the AWPA;

h. failing to pay wages owed to Plaintiff farm workers when due as prohibited by the AWPA;

i. violating, without justification, the terms of the working arrangement made by Defendants and Plaintiffs as prohibited by the AWPA; and

j. requiring Plaintiffs to purchase goods solely from a farm labor contractor.

34. Plaintiffs have been agrrieved by the above violations and have attempted unsuccessfully to resolve the issues with

Defendants before resorting to litigation. Plaintiffs are therefore entitled to an award of $500.00 per person for each of the above violations.

SECOND CAUSE OF ACTION

35. At all times relevant to this action, Plaintiffs were employed by Defendants and Plaintiffs' employment was employment covered by the Fair Labor Standards Act, 29 U.S.C. §§201 et seq.

36. Defendants violated FLSA by, inter alia, failing to pay Plaintiffs the minimum wage required by 29 U.S.C. §206.

37. Plaintiffs have suffered substantial economic loss as a result of these violations and seek redress for these injuries pursuant to 29 U.S.C. §216(b).

THIRD CAUSE OF ACTION

38. Defendants entered into employment contracts with Plaintiffs.

39. At all times relevant herein, Plaintiffs were ready, willing, and able to perform their duites under the contract.

40. Defendants breached the employment contract with Plaintiffs by failing to abide by the terms and conditions promised to Plaintiffs.

41. Defendants' failure to fulfill their obligation under the terms of the contract caused Plaintiffs severe financial loss.

42. Plaintiffs have suffered substantial economic loss as a result of Defendants' breach of the employment contract.

REQUEST FOR RELEIF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Award each Plaintiff $500.00 statutory damages for each of Defendants' violations of the AWPA as set forth above and provided for in 29 U.S.C. §1854(c);

B. Award each Plaintiff their unpaid minimum wages plus an equal amount in

liquidated damages as provided in 29 U.S.C. §216(b);

C. Enter a declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202 that Defendants have violated FLSA and AWPA in the course of their employment and recruitment of Plaintiffs;

D. Award each Plaintiff damages for Defendants' breach of the employment contract;

E. Award Plaintiffs their costs and reasonable attorneys fees as provided by state and federal law; and

F. Award Plaintiffs such other relief as this Court may deem just and proper.

Respectfully submitted,

TEXAS RURAL LEGAL AID,
INC. FARM WORKER DIVISION
P.O. Box 2238
Herefore, Texas 79045
(806) 364-3961

BY: _____
VIVIANA S. PATINO
Attorney in Charge

APPENDIX G

Defendants' Original Answer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| MARGARITO REYES ET. AL., | § | |
| | § | |
| PLAINTIFFS | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. B-85-412 |
| GRIFFIN & BRAND OF McALLEN, INC., ET. AL., ET. AL., | § | |
| | § | |
| DEFENDANTS | | |

DEFENDANTS' ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Come Now GRIFFIN and BRAND OF McALLEN, INC., DANIEL TORRES, ALFREDO CANTU, BENITO BAZAN and GUADALUPE SALDIVAR, Defendants in the above styled and numbered cause, and file this their Original Answer in reply to Plaintiffs' Original Complaint, and respectfully show unto the Court as follows:

1. Defendants deny the allegations in Plaintiffs' Paragraphs 1, 2, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27,

28, 29, 30, 33, 34, 36, 37, 38, 39, 40, 41, and 42.

2. Defendants do not have sufficient information to affirm or deny the allegations in Plaintiffs' Paragraph 3, 9, 10, 11, 17, 31, 32, and 35.

3. Defendants admit the allegations in Plaintiffs' Paragraph 4, 5, 6, 7, and 8 concerning the identity of Defendants.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the Court enter judgment dismissing the complaint; that Defendants be awarded costs herein; and that Defendants be granted such other and further relief as the Court may deem proper.

Respectfully submitted,

ALLEE & GARCIA
101 North 10th Street
Edinburg, Texas 78539
(512) 383-0742

BY: _____
DONALD W. ALLEE
State Bar Number:
01017300

ATTORNEY FOR DEFENDANTS

## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 1985, I deposited in the United States mail, postage prepaid, a true and correct copy of the preceding document to: Viviana S. Patino, P.O. Box 2238, Hereford, Texas 79045.

DONALD W. ALLEE

APPENDIX H

Defendants' Griffin and Brand of McAllen, Inc., Daniel Torres, Alfredo Cantu, Benito Bazan and Guadalupe Saldivar Motion To Compel Responses and for Sanctions Against Plaintiff Margarito Reyes

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| MARGARITO REYES ET. AL., | § | |
| | § | |
| PLAINTIFFS | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. B-85-412 |
| GRIFFIN & BRAND OF McALLEN, INC., ET. AL., ET. AL., | § | |
| | § | |
| DEFENDANTS | | |

DEFENDANTS' GRIFFIN AND BRAND OF MCALLEN, INC., DANIEL TORRES, ALFREDO CANTU, BENITO BAZAN AND GUADALUPE SALDIVAR MOTION TO COMPEL RESPONSES AND FOR SANCTIONS AGAINST PLAINTIFF MARGARITO REYES

Comes Now Defendants Griffin and Brand of McAllen, Inc., Daniel Torres, Alfredo Cantu, Benito Bazan and Guadalupe Saldivar and file this motion to compel responses and for sanctions against Plaintiff Margarito Reyes and would show the following:

1. On January 23, 1986, Defendants served interrogatories and a motion for production on Plaintiff Margarito Reyes. In addition, such Plaintiff was noticed for deposition on March 26, 1986. Subsequently at Plaintiff's attorneys' request, such Plaintiff's deposition was re-scheduled for April 25, 1986.

2. To date Plaintiff has failed to respond to Defendants' interrogatories and requests for production. In addition, such Plaintiff failed to appear for deposition.

3. Plaintiff's non-appearance affidavit is attached hereto. (Exhibit "A").

4. Rule 37 F.R.C.P. provides that the Court may order Plaintiff to comply with Defendants' discovery requests and order such Plaintiff to pay Defendants' reasonable expenses including attorney's fees. Defendants' attorneys spent one half hour waiting for Plaintiff to appear for deposition and incurred expenses of $45.00 in the prepara-

tion of the non-appearance affidavit, one hour in the preparation and filing of this motion and an estimated three hours will be required for attending hearing on this motion.

5. In addition, the Court may impose sanctions on Plaintiff Margarito Reyes for failure to respond to Defendants' discovery requests including prohibiting such Plaintiff from opposing the defense of Defendants and striking out portions of Plaintiff's pleadings.

Defendants move the Court for an order directing Plaintiff Margarito Reyes to respond fully to Defendants' discovery requests including attendance at deposition and requiring such Plaintiff and/or Plaintiff's attorney to pay the expenses, including attorney's fees of Defendants in the preparation, filing and hearing of this motion.

APPENDIX I

Order of U.S. District Court for the Southern District of Texas, Brownsville Division, dated July 28, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| MARGARITO REYES ET. AL., | § | |
| | § | |
| PLAINTIFFS | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. B-85-412 |
| GRIFFIN & BRAND OF McALLEN, INC., ET. AL., ET. AL., | § | |
| | § | |
| DEFENDANTS | | |

O R D E R

On the 17th day of July, 1986, came on to be heard Defendant Griffin & Brand of McAllen, Inc.'s (hereinafter Defendant) Motions for Protective Order, to Compel, and for Sacntions. The Court has considered the pleadings on file and the arguments of counsel and is of the opinion that:

1. With respect to Defendant's Motion for Protective Order

a. Defendant is hereby ORDERED to respond to Plaintiffs' Interrogatory No. 5 inquiring into the names of the officers and directors of Defendant Griffin & Brand. Therefore, the Motion in this part, is DENIED.

b. Plaintiffs are ORDERED to limit the scope of their Interrogatory No. 6, concerning subsidiaries and corporate structure of Defendant, to the facts in issue in the instant case. Therefore, Defendant's Motion for Protective Order is, in this part, GRANTED.

c. Plaintiffs are further ORDERED to limit their Interrogatory No. 7, concerning Griffin & Brand's employees, to the packing season at issue in Pecos, Texas. Therefore, Defendant's Motion is thus GRANTED.

Plaintiffs shall reword Interrogatories No. 6 and 7 in compliance with this Order before Defendant is required to respond to them.

2. With regard to Defendant's Motion to Compel and for Sanctions, the Court finds and orders that

a. The eleven (11) Plaintiffs who have not made themselves available for noticed depositions are hereby ORDERED to submit to depositions on or before October 7, 1986, or risk suffering dismissal of their respective causes of action for want of prosecution.

b. Those 11 Plaintiffs who failed to appear for their noticed depositions are ORDERED to pay Defendant $865.00 in reasonable attorney's fees and costs incurred as a result of those Plaintiffs' failure to appear. These costs and fees are to be paid within 20 days of the entry of this Order.

c. Plaintiffs should be, and are hereby, ORDERED to fully respond to Defendant's Interrogatory Number 6, concerning each Plaintiff's immigration status. The Court is of the opinion that Defendant is entitled to this information as it may lead to relevant evidence.

d. Those Plaintiffs who have failed to respond, in any manner, to Defendant's Interrogatories and Request for Production, are hereby ORDERED to respond to Defendant's discovery requests on or before October 7, 1986.

The Clerk shall send a copy of this Order to counsel for the parties.

DONE this 28th day of July, 1986, at Brownsville, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

APPENDIX J

Order of U.S. District Court for the Southern District of Texas, Brownsville Division Dated October 3, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

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|---|---|---|
| MARGARITO REYES ET. AL., | § | |
| PLAINTIFFS | § | |
| VS. | § | CIVIL ACTION |
| | § | NO. B-85-412 |
| GRIFFIN & BRAND OF McALLEN, INC., ET. AL., ET. AL., | § | |
| DEFENDANTS | § | |

O R D E R

The Court, having considered Plaintiffs' Motion to consider the Court's July 28, 1986 Order, is of the opinion that plaintiffs' Motion should be denied. It is, therefore

ORDERED that Plaintiffs' Motion for Reconsideration is DENIED and the Court's July 28, 1986 Order remains in effect.

The Clerk shall send a copy of this Order to counsel for the parties.

DONE this 3rd day of October, 1986, at Brownsville, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT COURT

APPENDIX K

Transcript of proceedings in the U.S. District Court for the Southern District of Texas, Brownsville Division in cause number B-85-412 styled Margarito Reyes et al vs. Griffin and Brand of McAllen, Inc., et al, on July 17, 1986 at 2:00 p.m.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

| | | |
|---|---|---|
| MARGARITO REYES ET. AL., | § | |
| PLAINTIFFS | § | CA No. B-85-412 |
| VS. | § | Brownsville, Texas |
| GRIFFIN & BRAND OF McALLEN, INC., ET. AL., | § | July 17, 1986 2:00 p.m. |
| DEFENDANTS | § | |

MOTION FOR PROTECTION

BEFORE THE HON. RICARDO H. HINOJOSA

APPEARANCE:

FOR THE PLAINTIFFS: Viviana S. Patino
Texas Rural Legal Aid,
1406 W. Highway 60
Hereford, Texas 79045

FOR THE DEFENDANTS: Donald W. Allee
101 North 10th Street
Edinburg, Texas 78539

Court Reporter: John R. Corr
P.O. Box 413
Brownsville, Texas
78529

Proceedings recorded by mechanical stenography; transcript produced by notereading.

. . .

MR. ALLEE: The one that has to do with immigration status. All of the plaintiffs object to answering if they were U.S. citizens or what their status was other than saying they were not H-2 workers.

THE COURT: Haven't we been through this before in another lawsuit already?

MR. ALLEE: Yes, sir. I think in those cases the Court did allow us to discover that.

MISS PATINO: Your Honor, plaintiffs don't see how this is relevant to this ligigation at all. Citizenship status it not a requirement to file under the FLSA or AWPA or under a breach of contract.

THE COURT: The Court is going to allow that to be discoverable for the same reasons I had in the prior suit.

MISS PATINO: If it's going to be ruled to be discoverable, may we do so under seal to you? There is a danger if any of these documents---

THE COURT: The danger with that is you are not supposed to be representing anybody who is undocumented Miss Patino.

MISS PATINO: That's true, Your Honor.

THE COURT: I think the last time a lawsuit involving the Legal Aid plaintiffs with Griffin and Brand defendants --- I am going to issue a written one on that with regard to whether it's discoverable or not, and I am going to go study that again. But I think at that point there is a question as to whether you can really represent people who are undocumented. In fact, I think your regs say you are not supposed to. Is that right?

MISS PATINO: That is correct, Your Honor. But the Act also says such matters shouldn't be interjected into litigation and argued before the Legal Services Corporation.

THE COURT: What I did in that case, I stayed all discovery until they had an opportunity to --

MISS PATINO: We don't want that to happen here. What we would like to do is submit the information to you. If you find it necessary to turn over the information to Mr. Allee so he can prosecute TRLA, that's fine.

THE COURT: I am just going to ask you to turn it over to him directly if I do. If for some reason you think it should be -- that the plaintiffs for some reason have a reason why it should be held confidential, whether it's because they are here illegally or whatever, then go ahead and file a motion to that effect. Do you have any problem with that being sealed?

MR. ALLEE: No, sir. That's fine.

THE COURT: If you agree it can be sealed, have it submitted that way. But I am going to issue an order with regard to that that will be in conformance with what I have done before on that issue. So, in all likelihood, be prepared for that, Miss Patino, because I am sure you have copies of that in your files.

MR. ALLEE: Tnere are some plaintiffs who have not filed responses to interrogatories at all.

THE COURT: They have to do so one week from today.

MISS PATINO: Those are the same plaintiffs who have not appeared.

MR. ALLEE: I think generally that is true.

THE COURT: They will have to do it by October 7th. Is that it?

MR. ALLEE: I think that's all we have.

THE COURT: If you don't have anything further, you may be excused.

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1609

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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GRIFFIN AND BRAND OF MCALLEN, INC., *et al.*,
*Petitioners*,

v.

MARGARITO REYES, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

---

DAVID G. HALL
*Counsel of Record*

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259 South Texas
Weslaco, Texas 78596
(512) 968-6574

*Counsel for Respondents*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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**No. 87-1609**

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GRIFFIN AND BRAND OF MCALLEN, INC., *et al.*,
*Petitioners,*

v.

MARGARITO REYES, *et al.*,
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

---

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit entered on March 30, 1987. That opinion is reported at 814 F.2d 168 (5th Cir. 1987); rehearing was denied on June 16, 1987. The opinion of the district court is unreported. (Pet. App. at 323-325).

## STATEMENT OF THE CASE

This matter involves the issuance of a writ of mandamus by the Fifth Circuit Court of Appeals to the

district court judge in *Margarito Reyes, et al. v. Griffin and Brand of McAllen, Inc., et al.*, No. B-85-412 (S.D. Tex. Brownsville Div.) (Hinojosa, J.). In that case, twenty-one farm laborers seek to redress alleged violations of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§1801, *et seq.* ("AWPA"), and the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.* ("FLSA"), and breach of an employment contract under Texas law. Plaintiffs are represented by Texas Rural Legal Aid, Inc. ("TRLA"), a Legal Services Corporation recipient within the meaning of the Legal Services Corporation Act, 42 U.S.C. §§2996, *et seq.* ("LSCA"). During pretrial discovery Defendants, a Texas vegetable producer that employed Plaintiffs and four of its farm labor contractors, submitted discovery requests to Plaintiffs. Interrogatory No. 6 of those requests sought information regarding the immigration and citizenship status of Defendants' former employees.[1] Plaintiffs objected to answering this request and Defendants moved to compel. The sole ground for Defendants' motion to compel was that "the matters inquired into are not privileged and are reasonably calculated to lead to discovery of admissible evidence."[2]

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[1] Interrogatory No. 6 provides, "Are you a citizen of the United States? If so, were you born in the United States? If so, please state where you were born and your birth date. If you are a naturalized citizen of the United States, please state where and when you became a citizen of the United States. If you are not a citizen of the United States, please state your immigration status."

[2] At no point in the district court proceedings did Defendants state how the requested information was relevant to the case.

On July 28, 1986, the district court entered a written order requiring the Plaintiff farm workers, "to fully respond to Defendant's Interrogatory Number 6, concerning each Plaintiff's immigration status." Plaintiffs requested that the court reconsider its ruling, but by order dated October 3, 1986, the workers' motion for reconsideration was denied. On November 4, 1986, Plaintiffs sought a writ of mandamus from the United States Court of Appeals for the Fifth Circuit to direct the district court to withdraw its order compelling discovery. On March 30, 1987, the Fifth Circuit Court of Appeals granted the writ of mandamus, "directing the district court to withdraw that portion of its discovery order requiring petitioners to answer questions concerning citizenship and alienage, including alienage status as documented or undocumented." *In Re Reyes*, 814 F.2d 168, 171 (5th Cir. 1987); Pet. App. at 11. Defendants' petition for rehearing was denied on June 16, 1987. (Pet. App. at 17, 18).

Defendants then filed their petition for writ of certiorari. Subsequently, Defendants and Plaintiffs stipulated to an "Agreed Final Order" which was entered by the district court on March 30, 1988. A copy of that order is attached hereto as Appendix A. Pursuant to that order, Defendants agreed,

> to pay to each Plaintiff the sum of ONE THOUSAND AND NO/100 DOLLARS ($1000.00), in full and final settlement of all claims by Plaintiffs against Defendants that arise out of, or are based on, any of the matters alleged in the complaint . . .

"Agreed Final Order" at 1-2. The order recited that seventeen of the twenty-one Plaintiffs had accepted

this settlement and dismissed their claims with prejudice. *Id.* at 2. The order also stated,

> 5. The remaining Plaintiffs, Rafael Cardenas, Jr., Juan Guel Palacios, Abraham Barbosa, Sr. and Cristina Barbosa, remain as active litigants pending a decision by the United States Supreme Court in the action filed by Defendants with such court. Upon a determination by the United States Supreme Court, Defendants will seek dismissal of this cause as to those Plaintiffs who have not contacted Plaintiffs' attorney and accepted or rejected the settlement offer contained herein.

*Id.* at 2. One of these four remaining Plaintiffs recently came forward to accept the settlement, the others have not been in contact with their attorney in over a year. In addition to the above "Agreed Final Order," Defendants have filed a motion to dismiss the remaining Plaintiffs for failure to make themselves available for deposition, despite having been ordered to do so by the district court.

## REASONS FOR DENYING THE PETITION FOR CERTIORARI

### A. Certiorari Should be Denied Because Defendants Seek An Advisory Opinion From This Court

As the above statement of facts makes clear, Defendants no longer have an interest in the immigration status of the Plaintiffs in this action, if they ever had such an interest, because they have entered into the "Agreed Final Order" to settle the lawsuit. Defendants continue to pursue their petition for certiorari in an apparent attempt to obtain an advi-

sory opinion from this Court as to the correctness of the district court's order compelling discovery. This Court does not sit to issue advisory opinions and it should decline to do so in this case.

**B. Certiorari Should Be Denied Because The Court Of Appeals Decision Does Not Conflict With Decisions Of Other Courts of Appeals Or This Court.**

The extraordinary circumstances that counsel review by writ of certiorari have not been satisfied in this case. Defendants allege that the decision of the Fifth Circuit "conflicts with the decisions of other federal courts of appeals and this Court on the same matter. . ." (Pet. at 2). However, the employers never articulate how the decision below conflicts with the decisions of the other circuit courts or of this Court.

**1. The Fifth Circuit Applied The Proper Standard In Issuing The Writ Of Mandamus**

Defendants contend that the Fifth Circuit erred in holding that the discovery dispute in this case met the legal standards for issuance of a writ of mandamus. However, the courts of appeals have frequently used mandamus to vacate orders compelling discovery where, as here, the discovery at issue is irrelevant and involves privileged information or information of a sensitive and personal nature. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (district court's order compelling a physical examination amounted to a usurpation of power); *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984) (writ granted to protect city officials from disclosing mental process in enacting ordinance); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953-954 (8th Cir. 1979), *cert. denied*, 441 U.S. 907 (1979) (mandamus granted to protect general interests in trade secrets not necessarily rising to the

level of a privilege; writ vacated on other grounds at rehearing); *Goldblum v. National Broadcasting Corporation*, 584 F.2d 904 (9th Cir. 1978) (mandamus appropriate to avoid production of privileged material); *Usery v. Ritter*, 547 F.2d 528 (10th Cir. 1977) (writ issued to vacate order compelling disclosure of identity of employee/informer in FLSA case, due to danger of possible retaliation); *Winters v. Travia*, 495 F.2d 839 (2nd Cir. 1974) (writ issued to protect Christian Scientist from physical examination); *United States Board of Parole v. Merhige*, 487 F.2d 25 (4th Cir. 1973), *cert. denied*, 417 U.S. 918 (1974) (writ barred intrusion into records of the Board of Parole); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd.*, 400 U.S. 348 (1971) (writ issued to vacate discovery order which would have infringed on attorney-client privilege); *see generally*, Wright and Miller, *Fed.Prac. & Pro.*: Civil §2006 (1970).

The Fifth Circuit's decision to issue a writ of mandamus to protect the Plaintiffs from discovery into their immigration status was well within the standards for the exercise of mandamus jurisdiction discussed in the above cases. Immigration status is a highly sensitive and personal matter; discovery into it could well intimidate farm workers from asserting their rights under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), to the detriment not only of those workers, but the public at large which has an interest in ensuring that those statutes are enforced.[3] Moreover, as set forth below, immigration status is wholly irrelevant to the issues in this case.

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[3] Farm workers who attempt to assert their rights are already

**2. Immigration Status Is Not Relevant To The Issues In This Case**

Defendants argue that Plaintiffs' immigration status is relevant to two general issues: (1) Plaintiffs' status as migrant or seasonal farm workers for purposes of AWPA, and (2) their right to the protections of AWPA and FLSA if they are undocumented aliens.[4]

As for the first issue, Plaintiffs' status as migrant or seasonal agricultural workers turns on whether they were "required to be absent overnight from [their] permanent place of residence." 29 U.S.C. §1802 (8)(A).[5] Plaintiffs have never objected to discovery concerning this issue, such as where they claim to

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subject to a "general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations." *Beliz v. W.H.McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985). Inquiry into immigration status would only compound this fear and intimidation.

[4] Defendants concede that the Legal Services Corporation Act, 42 U.S.C. § 2996e(b)(1)(B), deprives the district court of jurisdiction to consider the propriety of Plaintiffs' representation by a Legal Services Corporation grantee. *See, e.g., Anderson v. Redman*, 474 F.Supp. 511, 520 (D.Del. 1979).

[5] AWPA defines a "migrant agricultural worker" as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. §1802(8)(A). A seasonal agricultural worker is an individual who is not required to be absent overnight from his permanent place of residence. 29 U.S.C. §1802(10)(A). The AWPA provides somewhat different protections to migrant workers as opposed to seasonal workers.

permanently reside, their intent to remain there, or where they were living at the time they performed work for Defendants. But neither immigration status nor citizenship are relevant to the question of residence. *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982).

As for the second issue, the Fifth Circuit correctly found that "it is well established that the protection of the [FLSA] are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant . . . The same thing is true with respect to claiming the benefits of the AWPA." *In Re Reyes*, 814 F.2d at 170. *See, e.g., Marshall v. Presidio Valley Farms, Inc.*, 512 F.Supp. 1195 (W.D. Tex. 1981) (FLSA minimum wage award to undocumented farm workers); *Montelongo v. Meese*, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (damage award to farm workers regardless of immigration status under predecessor statute to AWPA); *Six Mexican Workers v. Arizona Citrus Growers*, 641 F.Supp. 259, 269 (D. Ariz. 1986) (same).

That undocumented workers are entitled to the protections of FLSA and AWPA is apparent from the language of those statutes. FLSA provides protection to "employees". An employee is defined as "*any individual* employed by an employer" subject to certain enumerated exceptions. 29 U.S.C. §203(e)(1) (emphasis added). Since undocumented aliens are not among the listed exceptions, they plainly come within the broad statutory definition of "employee." Similarly, AWPA extends its coverage to "*any individual* who engages in agricultural employment of a seasonal or other temporary nature . . ." without reference to the individ-

ual's immigration status. 29 U.S.C. §§1802(8)(A) and 1802(10)(A) (emphasis added).[6] The language in these two labor protective statutes is, thus, indistinguishable from the language of the National Labor Relations Act which this Court has found to cover undocumented aliens. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891-92 (1984). Coverage of undocumented aliens also advances the remedial purposes of FLSA and AWPA in the same way such coverage advances the purposes of the NLRA. *Id.* at 892. Nowhere in Defendants' petition for certiorari do Defendants cite authority for the proposition that undocumented workers are not covered by AWPA and FLSA, let alone any conflict in the circuits on this issue.

Because the information sought through Defendants' request would not lead to the discovery of admissible evidence, the court of appeals properly barred inquiry into Plaintiffs' immigration or citizenship status. The decision of the court of appeals that Plaintiffs' immigration or citizenship status was not relevant to any issues in litigation in no way conflicts with decisions by other courts of appeals or decisions by this Court.

### C. Petitioners Seek Review Of Determinations Of No Precedential Value

The issues raised by Defendants' petition for certiorari are of little importance to anyone other

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[6] AWPA does prohibit farm labor contractors from knowingly hiring undocumented aliens. 29 U.S.C. §1816. A ban on hiring undocumented aliens and a requirement that they be afforded the protections of the Act are not inconsistent. Both provisions ensure that domestic farm workers are not adversely affected by competition from undocumented aliens working under substandard conditions.

than the litigants in this case. Defendants do not challenge the legal standards relied upon by the Fifth Circuit in issuing mandamus, nor do they ask this Court to define the appropriate legal standards for mandamus. All defendants challenge is the application of established standards to the particular facts of this case. A decision by this Court that the Fifth Circuit correctly or incorrectly applied the standards for granting mandamus in this case is a highly fact-bound question which would provide little or no guidance to other litigants or to the courts of appeals on the proper exercise of mandamus jurisdiction. Because it would serve no useful purpose for this Court to grant certiorari, it should decline to do so.

## CONCLUSION

For the foregoing reasons the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully Submitted,

DAVID G. HALL
*Counsel of Record*

VIVIANA S. PATINO
TEXAS RURAL LEGAL AID, INC.
Farm Workers Division
259 South Texas Blvd.
Weslaco, Texas 78596

*Counsel for Respondents*

# APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**McALLEN DIVISION**

| | | |
|---|---|---|
| MARGARITO REYES, *et. al.* *Plaintiffs,* | ) | |
| vs. | ) | Civil Action |
| | ) | No. M-B-85-412 |
| GRIFFIN & BRAND OF MCALLEN, INC. DANIEL TORRES, ALFREDO CANTU BENITO BAZAN and GUADALUPE SALDIVAR *Defendants.* | ) | |

**AGREED FINAL ORDER**

WHEREAS Plaintiffs commenced this action against Defendants alleging violations of the Fair Labor Standards Act, 29 U.S.C. §§201, *et seq.* and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§1801, *et seq.* and breach of contract;

WHEREAS Defendants filed an answer denying any violations of said acts or contract;

WHEREAS Plaintiffs and Defendants wish to settle the action without litigation or trial and lay to rest all claims and controversies asserted therein, and all other claims that could be based on or arise out of any of the matters alleged in the complaint, between and among the parties;

IT IS THEREFORE STIPULATED, CONSENTED TO AND AGREED, by and among the undersigned as follows:

1. Defendants agree, without admitting the validity of Plaintiffs' allegations and in fact, continuing to deny such allegations, to pay to each Plaintiff the sum of ONE

THOUSAND AND NO/100 DOLLARS ($1,000.00), in full and final settlement of all claims by Plaintiffs against Defendants that arise out of, or are based on, any of the matters alleged in the complaint and to pay Plaintiffs' litigation expenses of $10,453.34 to Texas Rural Legal Aid, Inc.

2. The following Plaintiffs have accepted Defendants' offer: Margarito Reyes, Enrique Alanis, Jesus Alanis Gonzales, Rafael Cardenas, Sr., Santos Carrizales, Bernardo Cervantes, Esteban Hernandez, Juan Hernandez, Andres Olivares, Abraham Rivera, Jose Solis, Heberto Valdez, Alfonso Vargas, Pedro Vargas, Juan Lopez, Juan Jose Nunez, Enrique Diaz and Frumencio Torres Trigo.

3. The above named Plaintiffs agree to individually execute and deliver to Defendants full and final releases upon payment to each Plaintiff of the above amount.

4. As to the above named Plaintiffs, this action is dismissed with prejudice.

5. The remaining Plaintiffs, Rafael Cardenas, Jr., Juan Guel Palacios, Abraham Barbosa, Sr. and Cristina Barbosa, remain as active litigants pending a decision by the United States Supreme Court in the action filed by Defendants with such court. Upon a determination by the United States Supreme Court, Defendants will seek dismissal of this cause as to those Plaintiffs who have not contacted Plaintiffs' attorney and accepted or rejected the settlement offer contained herein.

6. Except as indicated in paragraph 1 herein, the parties shall bear their respective costs of suit.

7. This agreement shall inure to the benefit of and shall be binding upon the parties and their respective successors and assigns. This agreement sets forth the entire terms of the settlement between the parties hereto with respect to the subject matter hereof and its supersedes any and all agreements and understandings, if any, prior hereto.

Approved this 30th day of March, 1988 at McAllen, Texas.

/s/ _____
United States District Judge

Agreed as to Form and Substance:

/s/ VIVIANA S. PATINO
VIVIANA S. PATINO
*Attorney In Charge For Plaintiffs*
Admission ID No. 1496
TEXAS RURAL LEGAL AID, INC.
1220 North Stanton Street
El Paso, Texas 79902
(915) 544-4421

TRUE COPY I CERTIFY
ATTEST;
JESSE E. CLARK, Clerk

By _____
Deputy Clerk

/s/ DONALD W. ALLEE
DONALD W. ALLEE
*Attorney In Charge For Defendants*
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